APPENDIX

Opinion of the United States Court of Appeals for the 4th Circuit

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

STEVE EDWARD ROACH,
Petitioner-Appellant,

v.

No. 98-26

RONALD ANGELONE, Director,
Virginia Department of Corrections,
Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Virginia, at Roanoke.
Samuel G. Wilson, Chief District Judge.
(CA-97-693-R)

Argued: March 3, 1999

Decided: May 4, 1999

Before WIDENER, NIEMEYER, and KING, Circuit Judges.

Certificate of appealability denied and appeal dismissed by published opinion. Judge King wrote the opinion, in which Judge Widener and Judge Niemeyer concurred.

COUNSEL

ARGUED: Steven Marc Schneebaum, PATTON BOGGS, L.L.P., Washington, D.C., for Appellant. Robert Quentin Harris, Assistant Attorney General, OFFICE OF THE

ATTORNEY GENERAL, Richmond, Virginia, for Appellee. ON BRIEF: Benjamin G. Chew, Willa B. Perlmutter, Susan M. Mathiascheck, PATTON BOGGS, L.L.P., Washington, D.C., for Appellant. Mark L. Earley, Attorney General of Virginia, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellee.

OPINION

KING, Circuit Judge:

In 1995, Steve Edward Roach ("Roach"), was convicted of capital murder in the State of Virginia and sentenced to death. In 1996, the Supreme Court of Virginia affirmed the sentence, Roach v. Commonwealth, 468 S.E.2d 98 (Va. 1996), and the Supreme Court of the United States denied certiorari. Roach v. Virginia, 519 U.S. 951 (1996). Upon exhausting his state collateral remedies, Roach petitioned the United States District Court for the Western District of Virginia for a writ of habeas corpus. See 28 U.S.C.A. § 2254 (West Supp. 1998). After reviewing the parties' legal arguments and conducting an evidentiary hearing, the district court, on July 29, 1998, denied habeas corpus relief.

Roach has appealed to this court, pursuant to 28 U.S.C. § 1291, from the final order of the district court. In addition, Roach has filed with us a petition for a certificate of appealability, pursuant to 28 U.S.C. § 2253(c)[1] and Fed. R. App. P. 22. On

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[1] 28 U.S.C. § 2253(c) provides, in pertinent part:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from -

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State Court . . . .

appeal, Roach raises five issues that he claims warrant habeas relief. After careful consideration of each of Roach's contentions and the entire record, we find that Roach has failed to make a substantial showing of the denial of a constitutional right and that there is no basis for federal habeas corpus relief. Accordingly, we deny the petition for a certificate of appealability and dismiss the appeal.

I.

On December 3, 1993, Mary Ann Hughes ("Mrs. Hughes") was shot and killed in her home. The cause of death was a single shotgun blast to the chest. Mrs. Hughes's purse, containing her credit card and approximately sixty dollars in cash, and her 1981 Buick Regal were stolen. During the early morning hours of December 4, 1993, a Nottoway County deputy sheriff observed Mrs. Hughes's automobile parked in the parking lot of a shopping center in Blackstone, Virginia. The deputy subsequently identified Roach as the driver of the car. Later that same morning, Roach was videotaped while attempting to use Mrs. Hughes's credit card at an automated teller machine in Louisburg, North Carolina.

On December 5, 1993, a South Carolina State Trooper observed Mrs. Hughes's automobile traveling at an excessive rate of speed. When the trooper attempted to detain the vehicle, the driver stopped the car on the left shoulder of the road and escaped into the adjacent woods. The driver's clothes matched the description of the clothes Roach was observed wearing on the night of the murder.

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(2) A certificate of appealability may issue . .. only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C.A. § 2253 (West 1996). The showing which Roach is required to make in order to obtain a certificate of appealability under 28 U.S.C. § 2253, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), has not changed from the showing required of habeas corpus petitioners prior to 1996. See Mackall v. Angelone, 131 F.3d 442, 444, n.3 (4th Cir. 1997), cert. denied , 118 S.Ct. 907 (1998).

The items retrieved from the vehicle included Mrs. Hughes's purse, a blue jacket, a number eight load shotgun shell, and a plastic bag from a Winn-Dixie grocery store. Roach's latent palm prints and fingerprints were also recovered from the interior of the automobile.

On December 6, 1993, Roach returned to the Commonwealth of Virginia and voluntarily surrendered to Sheriff William Morris for questioning. During questioning, Roach initially attempted to deny his involvement in the murder and theft and implicate others. However, when presented with evidence independently gathered by police, Roach confessed to the crimes. Roach told the Sheriff:

> I went over there and saw her counting the money and as I was leaving, I had the shotgun laying at the door and I shot her, took the money, the car and left, went to North Carolina. And I cashed –I tried to use –use the credit card but-about four times[,] but it wouldn't work.

Roach v. Commonwealth at 103.

Because Roach was seventeen years old at the time of the murder of Mrs. Hughes, juvenile petitions were issued charging him with murder, using a firearm in the commission of murder, and robbery. The Commonwealth gave notice of its intent to try Roach as an adult and a transfer hearing was held in the juvenile court. The juvenile court found probable cause to believe that Roach committed the crimes and advised the Commonwealth's attorney that he could seek indictments against Roach before a grand jury.[2]

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[2] At the time of Roach's indictment and trial, transfers from the juvenile court system to the circuit court system were controlled by Va. Code § 16.1-269. Under that statute, the juvenile court was required to determine only if there was probable cause to believe Roach had committed an offense that would be a felony had it been committed by an adult. Va. Code

Roach was indicted and tried on charges of (1) capital murder of Mrs. Hughes in the commission of robbery while armed with a deadly weapon, in violation of Va. Code § 18.2-31(4); (2) use of a firearm in the commission of murder in violation of Va. Code § 18.2-53. 1; and (3) robbery by violence to the person of Mrs. Hughes, in violation of Va. Code § 18.2-58. The jury found Roach guilty on all three charges and the Commonwealth sought the death penalty.

In order to lawfully sentence a convicted defendant to death in Virginia, a jury must unanimously find, beyond a reasonable doubt, the presence of one of two aggravating factors. See Va. Code § 19.2-264.2 (Michie 1977). Those aggravating factors are colloquially known as the "future dangerousness predicate" and the "vileness predicate." At the sentencing phase of Roach's trial, the trial judge, finding the evidence of vileness insufficient as a matter of law, withdrew that predicate from the jury's consideration. The judge allowed the jury to consider the future dangerousness predicate alone. The jury, unanimously finding beyond a reasonable doubt that Roach represented a future danger to society, recommended the death penalty. The trial judge accepted the jury's recommendation and sentenced Roach to death.

On direct appeal, the Supreme Court of Virginia affirmed Roach's death sentence and the Supreme Court of the United States denied certiorari. Roach v. Commonwealth, supra. Roach v. Virginia, supra. After exhausting all state collateral remedies, Roach filed his petition for a writ of habeas corpus in the Western District of Virginia. In his thorough Memorandum Opinion, Chief Judge Samuel G. Wilson considered each of Roach's contentions and found no basis for federal habeas relief. Accordingly, the district court dismissed the petition.

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§ 16.1-269 was repealed in 1994 and replaced with a similar provision. See Va. Code Ann. § 16.1-269.1 (Michie 1997).

Roach now appeals that dismissal. The issues raised on appeal, as characterized by Roach, are as follows:

> 1. The proportionality review conducted by the Supreme Court of Virginia was constitutionally defective, in violation of Roach's due process rights;
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> 2. The evidence proffered by the Commonwealth during the penalty phase of the trial was constitutionally insufficient to support the jury's finding of future dangerousness;
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> 3. The trial court violated Roach's due process rights by refusing to instruct the jury regarding Roach's potential parole eligibility if sentenced to life imprisonment;
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> 4. The trial court violated Roach's due process rights by erroneously instructing the jury that its decision regarding punishment had to be unanimous;
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> 5. The procedure by which Virginia transferred Roach from juvenile court to circuit court for trial as an adult denied him a constitutionally mandated individualized assessment of maturity and moral responsibility.

Although Roach has placed special emphasis on the proportionality review issue, we have, in the circumstances of this case, made a comprehensive review of each of the issues presented by him on appeal. We address each of these five issues in turn.

II.

Roach filed his federal habeas corpus petition on February 12, 1998, after the April 24, 1996 enactment of the AEDPA. Accordingly, this Court must apply the deferential standard of review imposed by the AEDPA's amendments to 28 U.S.C.

§ 2254(d). See 28 U.S.C.A. § 2254 (West 1994 & Supp. 1998); Green v. French, 143 F.3d 865, 868 (4th Cir. 1998), cert. denied, 119 S.Ct. 844 (1999). Under the standards imposed by the AEDPA, a federal court may not grant a writ of habeas corpus on issues adjudicated in a state court unless the state proceedings:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C.A. § 2254(d) (West 1996). There is no allegation that Roach's sentence was based on an unreasonable determination of the facts; Roach does not claim that he is actually innocent of the murder of Mrs. Hughes. Therefore, our review is controlled by § 2254(d)(1). This court has previously interpreted the language of § 2254(d)(1) as authorizing habeas relief "only when the state courts have decided the question by interpreting or applying the precedent in a manner that reasonable jurists would all agree is unreasonable." Green v. French, 143 F.3d at 870.

A.

First, Roach argues that we must cause a writ of habeas corpus to issue because the Supreme Court of Virginia failed to conduct a meaningful proportionality review of his death sentence, in contravention of the Eighth and Fourteenth Amendments. According to Roach, the Supreme Court of Virginia failed to adequately review the imposition of the death

penalty against him, and such failure entitled him to federal habeas relief as a violation of the Due Process Clause.[3]

1.

Under Virginia law,[4] when a defendant has been convicted of a capital crime and sentenced to death, the Supreme Court of Virginia is required to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor" and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Roach v. Commonwealth, 468 S.E.2d at 113. When assessing whether the death sentence in question is excessive or disproportionate to the penalty imposed in other cases, the Supreme Court of Virginia considers "whether other

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[3] It appears from the record that Roach failed to raise this argument in his state habeas corpus petition. This issue, therefore, has not been exhausted and could be properly treated as procedurally defaulted. See Gray v. Netherland, 518 U.S. 152, 161-62 (1996). However, the issue of procedural default generally is an affirmative defense that the Commonwealth must raise and preserve. Yeatts v. Angelone, 166 F.3d 255, 261 (4th Cir. 1999). The Commonwealth has not asserted this defense here. Despite the Commonwealth's failure to preserve the issue, this court has the discretionary power to address a petitioner's procedural default sua sponte. Id at 262. However, as we have previously noted:

> The exercise of ... discretion should not be automatic, but must in every case be informed by those factors relevant to balancing the federal interest in comity and judicial economy against the petitioner's substantial interest injustice. Additionally, the court should consider whether justice requires that the habeas petitioner be afforded with notice and a reasonable opportunity to so address the issue of procedural default. Id. (citation omitted). Roach has not been provided with an opportunity to address the issue of procedural default. After consideration of these factors, we believe the proper course is to decline to address the issue of procedural default sua sponte, and to address the proportionality review issue on the merits.

[4] See Va. Code Ann. § 17-110.1(c)(1), (2) (Michie 1983).

sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant." Id (citing Jenkins v. Commonwealth, 423 S.E.2d 360, 371 (Va. 1992)).

In its review of Roach's direct appeal, the Supreme Court of Virginia made a comprehensive comparison of the record from the trial court in this case with the records of other capital murder cases in Virginia, to determine whether the death penalty imposed on Roach was excessive or disproportionate to the penalty imposed for similar crimes. Id. Because Roach's jury imposed the death penalty on the basis of the future dangerousness predicate alone, the court gave particular consideration to other capital murder cases in which robbery was the underlying felony and the death penalty was based only on the future dangerousness predicate.[5] The court also reviewed capital murder cases in which robbery was the underlying offense and a sentence of life imprisonment was imposed. Id. Based upon its review of the records from these cases, the court concluded that, while there were exceptions, juries in Virginia "generally impose the death sentence for crimes comparable or similar to Roach's murder of Mrs. Hughes." Id. at 114. Therefore, the Supreme Court of Virginia found the death penalty in this instance to be neither excessive nor disproportionate to the penalty imposed in comparable cases. Id.

2.

It is a well-settled proposition that the individual States are not constitutionally required to provide defendants who have been convicted of capital crimes with "proportionality reviews" of their death sentences. Pulley v. Harris, 465 U.S. 37, 50-51

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[5] Those cases were compiled in Yeatts v. Commonwealth, 410 S.E.2d 254, 267-68 (Va. 1991), and supplemented in Chichester v. Commonwealth, 448 S.E.2d 638, 652 (1994). Additionally, the Virginia Supreme Court stated that it considered Chandler v. Commonwealth, 455 S.E.2d 219 (Va. 1995), and Joseph v. Commonwealth, 452 S.E.2d 862 (Va. 1995). Roach v. Commonwealth at 113.

(1994). It is also generally accepted that federal habeas corpus relief is unavailable where a petitioner alleges the state court incorrectly or inadequately applied state law. See Buchanan v. Angelone, 103 F.3d 344, 351 (4th Cir. 1996), aff'd, 118 S.Ct. 757 (1998); Fisher v. Angelone, 163 F.3d 835, 854 (4th Cir. 1998). As we recently reiterated in Fisher, "basic principles of federalism permit us to review only those state court decisions that implicate federal constitutional rights." Id. In the present case, the proportionality review conducted by the Supreme Court of Virginia was mandated by a Virginia statute, not the federal constitution. Therefore, absent some specific evidence that the review procedures employed by that court constituted an independent violation of the federal constitution, we shall not entertain Roach's contention that the state court failed to follow state law. See id. at 854-55.

Recognizing the limited availability of federal habeas relief, Roach argues that the proportionality review scheme, as applied to his case, constitutes an independent violation of the Due Process Clause of the Fourteenth Amendment. Roach's basic argument may be outlined as follows: In order to avoid arbitrary and capricious sentencing and to ensure that capital punishment is applied consistently and fairly, the Eighth Amendment requires the States to institute procedures that narrow the class of persons eligible for the death penalty. Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976); Zant v. Stephens, 462 U.S. 862 (1983). According to Roach, Virginia has decided to review the proportionality of all death sentences as the means of satisfying this constitutional requirement. Now that it has elected to provide proportionality reviews, Roach argues, Virginia must do so in accordance with the Due Process Clause. If the State's actions do not comport with due process, this Court has the authority to intercede.

Roach asserts that, since the reinstatement of the death penalty in Virginia, the Supreme Court of Virginia has never overturned a death sentence. When conducting its

proportionality review, Roach claims the court only reviews similar cases where the jury sentenced the defendant to death. Roach asserts that the court never reviews cases where similar defendants, convicted of similar crimes, were sentenced to life imprisonment. Such a system, Roach maintains, is merely a "rubber stamp" affirmance of the imposition of the death penalty and not the "comparative analysis" required by the Due Process Clause.

Roach's assertions directly conflict with the statements made by the Supreme Court of Virginia regarding the cases it reviewed. That court stated that it reviewed capital murder cases in which robbery was the underlying felony and the death penalty was based only on the future dangerousness predicate. Roach v. Commonwealth, 468 S.E.2d at 113. Additionally, the court reviewed the records of capital murder cases where robbery was the underlying offense and a sentence of life imprisonment was imposed. Id. In response, Roach simply maintains that the court could not have reviewed those cases and affirmed his death sentence.

Put simply, Roach would have this court attempt to" look behind" the review conducted by the Supreme Court of Virginia and endeavor to ascertain what that court "really did" (which, in his view, differs from what the court stated it did). As we explain below, this would be a virtually impossible task and the Constitution does not require us to engage in such a speculative undertaking.

3.

As noted above, this Court does not have the power to reexamine a state court's determination of state law. In Walton v. Arizona, 487 U.S. 639, 655 (1990), the Supreme Court was presented with a similar challenge to the proportionality review of the Arizona Supreme Court. The Court held that, where the statutorily defined aggravating factor had been construed in a manner that furnished sufficient guidance to the sentencer, proportionality review was not constitutionally required. Id. at

655-56. In such an instance, the Court could lawfully presume that the death sentence in question was not" want only and freakishly imposed" and, therefore, the sentence was not disproportionate within any recognized meaning of the Eighth Amendment. Id. The Court found that the Arizona Supreme Court undertook its proportionality review in good faith and, held that the Constitution did not require it to look behind the Arizona Supreme Court's conclusion that the sentence was proportional. Id. at 656.

The same rationale is applicable here. In a capital case in Virginia, the constitutionally mandated narrowing of the class of persons eligible for the death penalty occurs twice during the trial process. First, during the guilt phase of the trial, the jury must decide if the defendant falls within a statutorily defined class of capital offenders. See e.g., Va. Code Ann. § 18.2-31(4) (Michie 1998). Second, during the sentencing phase of the trial, the jury must unanimously find the presence of an additional aggravating factor. See Va. Code Ann. § 19.2 - 264.2 (Michie 1977). The Supreme Court has found statutorily defined aggravating factors to satisfy the narrowing requirement, see Zant v. Stephens, supra, and we have ruled that Virginia's future dangerousness predicate is constitutional. Giarratano v. Procurier, 891 F.2d 483 (4th Cir. 1989). Therefore, pursuant to Walton v. Arizona, there being no allegation or indication that the Supreme Court of Virginia undertook its proportionality review in something other than "good faith," we will not look behind its conclusion that the sentence received by Roach was proportional to sentences received by similar defendants for similar crimes.[6] As this

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[6] We agree with the reasoning of the district court which stated in its Memorandum Opinion that::

> Even assuming that the failure by the Supreme Court of Virginia to conduct its proportionality review in a meaningful manner could, under some circumstances, amount to a violation of the Fourteenth Amendment, Roach has not demonstrated that the Supreme Court of Virginia's review of

court noted in Buchanan v. Angelone, 103 F.3d 344 (4th Cir. 1996), aff'd 118 S.Ct. 757 (1998), "on collateral review, federal courts are not required to re-examine a state court's good faith findings." Id. at 351 (citing Walton v. Arizona, 497 U.S. at 656). Accordingly, Roach's assertion of a due process violation in the proportionality review afforded him by Virginia must fail, and this court must deny federal habeas relief on this claim.

B.

Roach next argues that the evidence proffered by the Commonwealth was insufficient, as a matter of constitutional right, to support the jury's finding of future dangerousness. By allowing the jury to consider this aggravating factor, Roach maintains, the trial court violated his Fourteenth Amendment due process rights.

As we explained in Turner v. Williams, 35 F.3d 872, 894 (4th Cir. 1994), the sufficiency of the evidence necessary to prove the existence of an aggravating factor is reviewed under the standard established by Jackson v. Virginia, 443 U.S. 307 (1979). Under the Jackson standard, a court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements ... beyond a reasonable doubt." Jackson at 319.

1.

> Roach's sentence was so deficient as to amount to a federal constitutional violation .... The record thus demonstrates that the Supreme Court of Virginia conducted a thorough review of Roach's sentence in compliance with Virginia law. Although this court may view the matter differently, it may not review the state court's good-faith finding that the death sentence was not disproportionate or excessive when compared to the sentence imposed in similar cases.

Roach v. Angelone, No. 97-0693-R, at 11-12 (W.D. Va. July 29, 1998).

Virginia's statutory scheme for capital sentencing requires a jury to find the existence of at least one of two aggravating conditions before it lawfully may impose the death penalty.

> [A] sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a serious continuing threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

Va. Code Ann. § 19.2-264.2 (Michie 1977).[7]

In the present case, after evidence was presented in the sentencing phase of the trial, the trial judge determined that the State had failed to present sufficient evidence to allow the jury to consider the vileness predicate. Therefore, the trial judge withdrew the vileness predicate from the jury's consideration and permitted the jury to consider only whether the State had proved beyond a reasonable doubt that Roach represented a future danger to society.

2.

During the sentencing phase of the trial, the State presented evidence regarding Roach's past criminal convictions. That evidence demonstrated that within a seven-month period prior to the murder of Mrs. Hughes, Roach had "broken and entered a private residence, stolen a .357 Magnum pistol from that dwelling, committed two automobile larcenies, and violated a condition of his probation" by carrying a shotgun, which he

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[7] See also Va. Code Ann. § 19.264.4(C) (Michie 1980).

later used to murder Mrs. Hughes. Roach v. Commonwealth, 468 S.E.2d at 112. Of significance, the jury was also entitled to consider the evidence regarding the capital offense of which Roach had been convicted. Murphy v. Commonwealth, 431 S.E.2d 48, 53 (Va. 1993). That evidence was devastating– Roach murdered Mrs. Hughes with a shotgun as she stood in the doorway of her own home in order to steal her social security money and automobile. Roach v. Commonwealth at 112. As the Supreme Court of Virginia noted, under Virginia law, the facts and circumstances of the capital crime alone may be sufficient to support a finding of future dangerousness. Id.

This court may not substitute it, view of the evidence for that of the jury. Tuggle v. Thompson, 57 F. 3d 1356, 1369 (4th Cir.), vacated on other grounds, 516 U.S. 10 (1995). The Supreme Court of Virginia concluded that a reasonable jury could find that, given the evidence of Roach's escalating pattern of criminal behavior, culminating in the murder of Mrs. Hughes, there was a probability that Roach would commit criminal acts of violence that would constitute a continuing serious threat to society. Roach v. Commonwealth at 112. Viewing the evidence in the light most favorable to the prosecution, the conclusion of the Supreme Court of Virginia does not constitute an unreasonable application of, or conflict with, any clearly established federal law as determined by the Supreme Court of the United States.[8] See Green v. French, 143 F.3d at 870. We agree with the Supreme Court of Virginia and with the district court that the evidence was sufficient to

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[8] After reviewing this claim, Judge Wilson properly concluded:

> The court cannot find that the Supreme Court of Virginia's conclusion that this evidence, viewed in the light most favorable to the Commonwealth, was sufficient to prove future dangerousness conflicted with clearly established federal law as determined by the United States Supreme Court.

Roach v. Angelone, No. 97-0693-R, at 10-11 (W.D. Va. July 29, 1998).

support the finding of future dangerousness. The trial court did not deprive Roach of any constitutional protections in this regard.

C.

Roach next argues that the trial court erred by failing to instruct the jury that, if sentenced to life imprisonment, he would not become eligible for parole for a minimum of twenty-five years. Roach asserts that this court should extend the holding of Simmons v. South Carolina, 512 U.S. 154 (1994), to include cases where, if sentenced to life imprisonment, the defendant remains eligible for parole.

1.

In Simmons,[9] the defendant was tried and convicted of capital murder. Under South Carolina law, the defendant was ineligible for parole because he had previously pleaded guilty to other violent offenses. Id. at 156. Following the defendant's conviction, the State sought the death penalty based on his future dangerousness. Id. at 157.

During the penalty phase of the trial, Simmons presented evidence that the general public apparently misunderstood the meaning of the term "life imprisonment." Id. at 159. According to the evidence presented, the majority of people believed that if sentenced to life imprisonment in South Carolina, a convicted murderer would be paroled within twenty to thirty years. Id. During trial, the judge had refused to give any instructions to the jury regarding the defendant's ineligibility for parole. Id. at 160. Even when the jury inquired as to whether a sentence of life imprisonment carried with it the possibility of parole, the trial judge simply instructed the jury that they were not to concern themselves with parole or parole

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[9] We have recognized that Justice O'Connor's concurring opinion actually represents the holding in Simmons. See Keel v. French, 162 F.3d 263, 269 (4th Cir. 1998); Mu'min v. Pruett, 125 F.3d 192, 199 (4th Cir.), cert. denied, 118 S.Ct. 438 (1997).

eligibility. Id. Shortly after receiving this additional instruction, the jury returned with a sentence of death. Id.

In her concurring opinion, Justice O'Connor noted that capital sentencing proceedings must comport with the requirements of the Due Process Clause and, in our adversary system, a criminal defendant must be allowed the opportunity to meet the State's case against him. Id. at 175. Future dangerousness is a factor upon which the States may rely in seeking the death penalty, id.; California v. Ramos, 463 U.S. 992, 1002-03 (1983); however, where the State seeks to show that the defendant will be a future danger to society, the presentation of the fact that the defendant will never be paroled and released into the general public will often be the only way in which a violent criminal can successfully meet the State's case. Id. at 177. Therefore, the Court ruled, where the defendant is truly ineligible for parole, the Due Process Clause entitles the defendant to inform the jury of that fact. Id.

Roach now asserts that the logic of Justice O'Connor's holding in Simmons should be extended to circumstances where a sentence of life imprisonment includes the possibility of parole. Roach faces a serious problem with this assertion–this court has repeatedly considered this argument and consistently rejected it. [10] As the Supreme Court held, the decision whether or not to inform the jury of the possibility of the defendant's early release is generally left to the States. Simmons at 176. "In a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact. " Id.

In Keel v. French, Keel was convicted of capital murder in North Carolina and sentenced to death. Keel, 162 F.3d at 266. Keel argued that the trial court's refusal to instruct the jury regarding his parole status pursuant to Simmons was a

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[10] See Keel v. French, 162 F.3d 263 (4th Cir. 1998); Wilson v. Green, 155 F.3d 396 (4th Cir.), cert. denied, 119 S.Ct. 536 (1998); Arnold v. Evatt, 113 F.3d 1352 (4th Cir. 1997).

violation of his Eighth Amendment rights. Id. at 270. This Court, finding that Simmons limited the right to receive such an instruction to those instances where the alternative sentence is life without the possibility of parole, dismissed the petition. Id.

The Supreme Court of Virginia also considered this issue on Roach's direct appeal. Relying on its prior decision in Joseph v. Commonwealth, 452 S.E.2d 862 (Va. 1995), the court held that the Simmons rule applied only if the defendant was ineligible for parole. Because Roach would become eligible for parole in twenty-five years, the court concluded that he was not entitled to such an instruction. Roach v. Commonwealth, 468 S.E.2d at 105.[11]

2.

In order to obtain federal habeas relief, Roach must show that no reasonable jurist could interpret the rule of Simmons as limited in application to those defendants who are ineligible for parole under state law. Green, 143 F.3d at 870. Roach simply cannot make that showing. Had he not been sentenced to death, Roach would have been eligible for parole in twenty-five years. Therefore, under this Court's interpretation and application of Simmons, Roach is not entitled to habeas relief on this claim.

D.

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[11] After thoroughly reviewing this issue, the district court stated as follows:

> However compelling Roach's argument that the logic behind the decision in Simmons applies equally to his case, the court cannot find that the interpretation of Simmons adopted by the Supreme Court of Virginia is contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court.

Roach v. Angelone , No. 97-0693-R, at 7 (W.D. Va. July 29, 1998).

Roach next contests the trial court's jury instruction regarding the requirement of unanimity in the sentencing verdict.[12] Roach asserts that the last sentence of this instruction, "any decision you make regarding punishment must be unanimous" was improper. He argues that it impermissibly shifted the burden of proof and effectively instructed the jury that, in order to avoid the imposition of the death penalty, the defendant was required to persuade all of the jurors that one or more mitigating factors were applicable. This shifting of the burden of proof, Roach maintains, is constitutionally defective, and denied him the right to have all mitigating evidence considered and given appropriate weight by the jury.

1.

Unfortunately, Roach has a procedural problem with this issue--he failed to raise it on his direct appeal to the Supreme Court of Virginia. The first time Roach asserted this alleged error was in his state habeas corpus petition. The Supreme Court of Virginia, relying on its decision in Slayton v. Parrigan, 205 S. E.2d 680, 682 (Va. 1974), dismissed Roach's claim as procedurally barred. Roach v. Netherland, No. 96-2568 (Va.

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[12] The trial judge instructed the jury:

> You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life .... Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt, the following aggravating circumstances, that after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society. If you find from the evidence that the Commonwealth has proved that circumstance beyond a reasonable doubt, then you may fix the punishment of the defendant at death, but if you believe from all of the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at ... imprisonment for life .... Any decision you make regarding punishment must be unanimous.

April 30, 1997). In Slayton, a prisoner filed a petition for habeas corpus, alleging ineffective assistance of counsel and an impermissibly suggestive pretrial identification. Id. at 681. The sole issue before the Supreme Court of Virginia was whether the petitioner had standing to attack the allegedly improper identification in a habeas proceeding where the petitioner did not assert the defense at trial and did not raise the issue on direct appeal. Id. Reasoning that "a prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes, " the court ruled that the petitioner had no such standing. Id. at 682.

Where a state court expressly denies a claim under a state procedural default rule, the defendant is generally precluded from raising that claim in a federal habeas corpus proceeding. Keel, 162 F.3d at 268 (citing Sawyer v. Whitley, 505 U.S. 333, 338 (1992)). The basis for the procedural default, however, must be an adequate and independent state ground. Coleman v. Thompson, 501 U.S. 722, 731-32 (1991). "We have repeatedly recognized that the procedural default rule set forth in Slayton constitutes an adequate and independent state law ground for decision." Fisher v. Angelone , 163 F. 3d 835, 844 (4th Cir. 1998).[13] Therefore, absent a showing of actual innocence or cause and prejudice, this claim is procedurally barred from federal habeas review.

2.

As the district court noted, Roach does not maintain that he is actually innocent of the murder of Mrs. Hughes. This court, then, may only inquire as to whether cause and prejudice exists to excuse a state procedural default, not into whether the state court property applied its own law. Fisher at 844. Cause exists, and will serve to excuse the failure to raise a claim during a state proceeding, where the factual or legal basis for the claim

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[13] See also Mu'min v. Pruett, 125 F.3d 192, 196 (4th Cir.), cert. denied 118 S.Ct. 438 (1997); Bennett v. Angelone , 92 F.3d 1336, 1343 (4th Cir. 1996); Spencer v. Murray, 18 F.3d 229, 232 (4th Cir. 1994).

was not reasonably available to the claimant at the time of the state proceeding. McCleskey v. Zant, 499 U.S. 467, 494(1991).

The basis for Roach's claim here is that the trial court gave an erroneous instruction to the jury regarding the requirement of unanimity in the sentencing verdict. Both the factual and legal bases for this claim were available to Roach prior to his direct appeal. On its face, then, this claim has been procedurally defaulted. Roach, however, attempts to vault this sizable hurdle by asserting ineffective assistance of appellate counsel as the cause for his failure to raise this issue on direct appeal. Roach's argument is not compelling and must be rejected.[14]

3.

In order to prove that he has been denied his Sixth Amendment right to effective assistance of appellate counsel, Roach must satisfy the two-prong test set forth in Strickland v. Washington , 466 U.S. 668 (1984). First, Roach must show that

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[14] It is axiomatic that before a petitioner may obtain federal habeas relief, he must first exhaust his state remedies. 28 U.S.C.A. § 2254(b)(1) (West 1996). A claim is not exhausted until the petitioner has "fairly presented" his claim to the state's highest court. Picard v. Connor, 404 U.S. 270, 275-78 (1971). The petitioner must have presented the substance of the claim, including the facts underlying the claim, to the state court. Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997). In this instance, the district court found that Roach did not present the substance of his claim of ineffective assistance of appellate counsel to the Supreme Court of Virginia and, therefore, failed to exhaust his state remedies. Accordingly, the district court concluded, the claim is procedurally barred from federal habeas review. See Gray v. Netherland, 518 U.S. 152, 161-62 (1996).

Although the district court found Roach's claim of ineffective assistance of appellate counsel barred from federal review, it went on to address the merits of the claim. Upon review of the record, we agree with the district court that this claim is procedurally barred. A contrary conclusion would establish Strickland v. Washington , 466 U.S. 668 (1984), as the backdoor through which petitioners may avoid legitimate state procedural bars. However, like the district court, we recognize the finality of our decision in this death penalty appeal. Therefore, we have also independently reviewed the asserted merits of Roach's ineffective assistance claim and have found no basis for federal habeas relief.

his counsel's representation in the appellate proceedings fell below an objective standard of reasonableness. Id. at 688. Second, he must show that his attorney's substandard conduct prejudiced him to the extent that it deprived him of a fair trial. Id. at 689. In other words, Roach must demonstrate that, but for his attorney's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. See id. A reasonable probability is one that undermines confidence in the outcome of the proceedings. Id.

Roach alleges that his counsel rendered ineffective assistance when he failed to raise the allegedly improper jury instruction on direct appeal before the Supreme Court of Virginia. According to Roach, this improper instruction violated his Eighth and Fourteenth Amendment rights under the holdings of Mills v. Maryland, 486 U.S. 367 (1988), and McCoy v. North Carolina, 494 U.S. 433 (1990).

In Mills and McCoy, the trial courts instructed their respective juries that their findings as to mitigating circumstances had to be unanimous. The Supreme Court found such instructions to be unconstitutional. Mills at 384; McCoy at 444. Unlike the present case, however, both Mills and McCoy involved state sentencing schemes which required the jury to make findings as to specific mitigating circumstances. Mills at 370; McCoy at 436. A jury instruction violates the holdings of Mills and McCoy if there is a "reasonable probability" that the jury applied the instruction in such a way as to preclude its consideration of mitigating evidence. Boyde v. California, 494 U.S. 370, 380(1990).

Unlike the sentencing schemes at issue in Mills and McCoy. the Virginia sentencing scheme does not require juries to make findings as to specific mitigating factors. Instead, juries are instructed to consider all possible mitigating circumstances before rendering their sentencing decision. Here, the trial judge instructed the jury to "consider any evidence presented of circumstances which ... in fairness or mercy may extenuate or

reduce the degree of moral culpability and punishment." Additionally, the verdict form provided to the jury indicated that it must consider all mitigating evidence and it did not limit the jury's consideration of that mitigating evidence in any fashion. Based upon these facts, the district court found it unlikely that the general unanimity instruction given by the trial court prevented the jury from considering and giving appropriate weight to the mitigating evidence. Accordingly, the district court held that, to the extent the Supreme Court of Virginia considered the merits of this claim, its adjudication of the claim was reasonable under Strickland. [15]

We agree. In the present case, the trial judge instructed the jury to consider any and all evidence presented in mitigation of the crime. The verdict form reinforced that instruction. Based upon those facts, we cannot find a reasonable probability that the jury applied the general unanimity instruction in such a way as to preclude its consideration of the mitigating evidence presented by Roach.

In determining whether petitioner has demonstrated that his counsel's representation was inadequate, this court begins with the strong presumption that counsel's conduct fell within the wide range of objectively reasonable conduct. Evans v. Thompson, 881 F.2d 117, 124 (4th Cir. 1989). Because the jury instruction in question cannot be said to violate Mills and McCoy, Roach's appellate counsel's failure to raise the issue of

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[15] In this regard, the district court stated as follows:

> The court finds that the instruction, when considered in conjunction with the verdict form, did not create a "reasonable probability " that the jury applied the instruction in such a way as to preclude its consideration of mitigating evidence. Accordingly, to the extent that the Supreme Court of Virginia addressed this claim on the merits, its adjudication of the claim was reasonable under Strickland.

Roach v. Angelone, No 97-0693-R, at 17-18 (W.D. Va. July 29, 1998) (citation omitted).

the instruction on direct appeal does not fall outside that wide realm of objectively reasonable professional assistance. Strickland, 466 U.S. at 689. Therefore, Roach's claim of ineffective assistance of appellate counsel fails on its merits, and it is rejected.

E.

Finally, Roach argues that the procedure employed by the Commonwealth of Virginia to transfer him from the juvenile court system into the circuit court system for trial as an adult violated his Eighth and Fourteenth Amendment rights. According to Roach, because Virginia's juvenile transfer procedure does not mandate a judicial finding that the juvenile possesses the requisite maturity and moral responsibility to be tried as an adult, it is unconstitutional.

1.

At the time of Roach's arrest and indictment, transfers from the juvenile court system to the county court system were controlled by Va. Code § 16.1-269.[16] Under that statute, the juvenile court was required to determine merely if there were probable cause to believe the juvenile had committed an offense that would be a felony had it been committed by an adult.

In the present case, after the prosecution gave notice of its intent to try Roach as an adult, a transfer hearing was conducted in the Greene County Juvenile and Domestic Relations District Court. Roach v. Commonwealth at 98. The juvenile court found probable cause to believe that Roach had committed the crimes and advised the Commonwealth's attorney that he could seek indictments against Roach before a grand jury. Id. The trial court then reviewed the transfer order under Va. Code § 16.1-269 and found probable cause to

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[16] Va. Code § 16.1-269 was repealed in 1994 and replaced with a similar provision. See Va. Code Ann. § 16.1-269.1 (Michie 1997).

believe that Roach had committed the offenses in question. Id. Subsequently, Roach was indicted, tried, and convicted.

Roach advanced this claim on direct appeal before the Supreme Court of Virginia. Relying on its previous decisions in Wright v. Commonwealth, 427 S.E.2d 379, 383-84 (Va. 1993), vacated and remanded, 114 S.Ct. 2701 (1994), aff'd 450 S.E.2d 361 (Va. 1994), and Thomas v. Commonwealth, 419 S.E.2d 606, 609 (Va. 1992), the Supreme Court of Virginia rejected Roach's argument and held that the Commonwealth was not constitutionally required to provide individualized consideration of a juvenile's moral culpability and maturity under the Virginia transfer statute. Roach v. Commonwealth at 105.

In Thomas, a seventeen-year-old defendant appeared in juvenile court charged with first degree murder and capital murder. Thomas at 607. The defendant and his counsel waived a preliminary hearing and a transfer hearing in the juvenile court and the defendant was transferred to stand trial as an adult in circuit court. Id. at 608. Subsequently, the defendant's court-appointed lawyer was relieved and the court appointed new counsel, who moved to remand the proceeding to juvenile court for a full transfer hearing. Id. at 609. The trial court denied the motion to remand and the defendant was tried, convicted, and sentenced to death. Id. at 608.

On appeal, the Supreme Court of Virginia held that the Constitution required neither juvenile transfer hearings nor any other additional procedural safeguards for juveniles tried for capital crimes. Id. at 609. According to the court, "Virginia's death penalty statutes provide for individual consideration of all those tried on capital charges, with the age of the defendant at the time ... of the capital offenses' a statutorily prescribed mitigating factor the jury may consider in determining whether to fix punishment at death or life imprisonment." Id.; see also Va. Code Ann. § 19.2-264.4(B)(v) (Michie 1998).

In Wright, a seventeen-year-old defendant was transferred from the juvenile court system to the circuit court, where he was tried as an adult and convicted of numerous violent offenses, including capital murder. Wright, 427 S.E.2d at 381-82. After finding the existence of the future dangerousness predicate, the jury fixed the defendant's sentence at death. On appeal, the defendant argued that his Eighth Amendment rights had been violated because Virginia's juvenile transfer statute did not mandate consideration of his moral responsibility and psychological maturity. Id. at 384. Relying on Stanford v. Kentucky, Wright argued that he was deprived of the individual consideration required before a state lawfully may impose the death penalty on a minor. Id. The Supreme Court of Virginia disagreed. Relying on its previous holding in Thomas, the court reiterated that the Constitution did not require juvenile transfer hearings or any other additional procedural safeguards for juveniles tried for capital offenses, and that Virginia's death penalty statutes provided the requisite individualized consideration demanded by the Constitution. Id. at 384.

Now, in order to obtain federal habeas relief on this claim, Roach must demonstrate that these holdings are contrary to or an unreasonable application of clearly established federal law as decided by the Supreme Court of the United States. In other words, Roach must show that the Supreme Court of Virginia interpreted or applied the precedent of the Supreme Court of the United States in a manner that reasonable jurists would all agree is unreasonable. Green v. French, 143 F.3d at 870.

2.

According to Roach, in order to pass constitutional muster, a state's laws must provide a fair basis for evaluating the culpability, moral responsibility, and maturity of a juvenile before referring him for trial and potential punishment as an adult. In order to make that determination, the State must provide the juvenile with "individualized consideration."

Like the defendant in Wright, Roach relies upon Stanford v. Kentucky, 492 U.S. 361, 375 (1989), for the proposition that the Supreme Court has mandated that this individualized culpability analysis take place prior to a decision to transfer a juvenile for trial as an adult for a capital offense. Because the juvenile court did not make such an individualized determination in the present case, Roach argues, his transfer to adult court for trial violated his Eighth and Fourteenth Amendment rights.

In our view, Roach's interpretation of Stanford is overreaching. In Stanford, the Supreme Court addressed whether the Eighth Amendment prohibited the execution of sixteen- and seventeen-year-old capital offenders. The Court concluded that the imposition of capital punishment under these circumstances did not violate the Eighth Amendment. In the portion of the opinion cited by Roach,[17] Justice Scalia discussed why state laws denying minors the right to drink alcoholic beverages, vote, or drive automobiles were inapplicable to the issue before the Court. Stanford at 374-75. According to Justice Scalia, capital punishment differs from the above generalized prohibitions, in that individualized consideration is a constitutional requirement. Id.

Notwithstanding Roach's assertions to the contrary, the Supreme Court simply did not hold that juvenile transfer statutes which do not provide for individualized consideration of the minor's maturity and moral responsibility violate the Constitution. Rather, Justice Scalia concluded that the transfer statutes in question [18] required the state courts to make determinations that ensured individualized consideration of the maturity and moral responsibility of sixteen- and seventeen-year-old offenders occurred before those minors were required to stand trial as adults. Id. at 375. The Supreme

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[17] Only four justices joined in this portion of the opinion.

[18] See Ky. Rev. Stat. Ann. § 208.170 (Michie 1982), repealed effective July 15, 1984; and Mo. Rev. State. § 211.071(6) (1986).

Court did not hold that all juvenile transfer statutes must provide an identical level of individualized consideration to minor defendants accused of capital crimes to be constitutional. Additionally, the Supreme Court did not proscribe a State from providing individual consideration in another manner.

In the present case, the Supreme Court of Virginia held that Virginia's capital sentencing scheme[19] satisfied the constitutional requirement of individual consideration. Roach v. Commonwealth, 468 S.E.2d at 105.[20] Because the Supreme Court did not rule that individual consideration of the defendant's maturity and moral responsibility was required at the juvenile transfer stage, a reasonable jurist could conclude that Virginia's procedure satisfies the Constitution. Accordingly, Roach cannot meet his burden of proof here. He has not demonstrated that the Supreme Court of Virginia's adjudication of this claim is contrary to or an unreasonable application of clearly established federal law as decided by the

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[19] See Va. Code Ann. § 19.2-264.4(B) (Michie 1998), which provides that the defendant's age at the time of the offense may be considered as a mitigating factor by the sentencing jury.

[20] Judge Wilson, in his Memorandum Opinion in the district court, agreed, stating:

> Justice Scalia did not state that juvenile transfer statutes which do not provide for individualized consideration violate the Constitution. A reasonable jurist could conclude, therefore, that the Constitution does not require a judicial determination of a juvenile offender's moral culpability and maturity before the state may try the juvenile as an adult for a capital crime.... The court concludes that Roach has not demonstrated that the Supreme Court of Virginia's adjudication of this claim conflicted with clearly established federal law as decided by the United States Supreme Court.

Roach v. Angelone, No. 97-0693-R, at 8-9 (W.D. Va. July 29, 1998) (footnotes omitted).

Supreme Court of the United States and, therefore, he does not qualify for federal habeas relief on this claim.

III.

Roach – who is clearly guilty of committing an egregious offense against Mrs. Hughes and the peace and dignity of the Commonwealth of Virginia – has been accorded a full array of post-conviction remedies. He has, in candor, been provided with all the process due under our system of justice, by way of both direct appeal and collateral proceedings challenging his conviction and sentence. Pursuant to the foregoing, we must conclude that Roach has failed to make a substantial showing of the denial of a constitutional right and that there is no valid basis for habeas corpus relief. Roach's petition for a certificate of appealability is therefore denied and his appeal of the decision of the district court is dismissed.

CERTIFICATE OF APPEALABILITY
DENIED AND APPEAL DISMISSED

PRIOR HISTORY. FROM THE CIRCUIT COURT OF GREENE COUNTY. Lloyd C. Sullenberger, Judge.

DISPOSITION: Affirmed.

COUNSEL: David L. Heilberg (Peter L. McCloud; Boyle, Bain & Downer, on briefs), for appellant.

Robert B. Beasley, Jr., Assistant Attorney General (James S. Gilmore, III, Attorney General, on brief), for appellee.

JUDGES: Present: All the Justices. OPINION BY JUSTICE BARBARA MILANO KEENAN.

OPINIONBY: BARBARA MILANO KEENAN

In this appeal, we review a capital murder conviction and a death sentence imposed upon Steve Edward Roach for the murder of Mary Ann Hughes, his 70-year-old neighbor.[1]

1. PROCEEDINGS

Juvenile petitions were issued against Roach, who was 17 years old at the time of these offenses, charging him with capital murder, use of a firearm in the commission of murder, and robbery. The Commonwealth gave notice of intent to try Roach as an adult and a transfer hearing was conducted in the Greene County Juvenile and Domestic Relations District Court (the juvenile court). Finding probable cause to believe that Roach committed the crimes, the juvenile court advised the Commonwealth's Attorney that he could seek indictments against Roach before a grand jury. The circuit court then

[1] Roach has not appealed his convictions of robbery and use of a firearm in the commission of murder.

reviewed the transfer order under Code § 16.1-269 and found probable cause to believe that Roach committed all three offenses.

Roach was tried as an adult on indictments charging (1) capital murder of Mary Ann Hughes in the commission of robbery while armed with a deadly weapon, in violation of Code § 18.2-31(4); (2) use of a firearm in the commission of murder, in violation of Code § 18.253. 1; and (3) robbery by violence to the person of Mary Ann Hughes, in violation of Code § 18.2-58. At the first stage of a bifurcated jury trial conducted pursuant to Code §§ 19.2-264.3 and -264.4(A), Roach was found guilty as charged in all three indictments.[2]

At the penalty phase of the capital murder trial, the court struck the evidence as to the "vileness" predicate of a capital sentence, but submitted the case to the jury upon the "future dangerousness" predicate. The jury found that the "future dangerousness" predicate was satisfied and unanimously fixed Roach's punishment at death.

Upon review of victim impact statements and a probation officer's report, and after conducting a sentencing hearing, the trial court sentenced Roach in accord with the jury verdict on the capital murder conviction. Further, the court sentenced Roach to three years imprisonment for the use of a firearm in the commission of a murder and to life imprisonment for robbery.

II. THE EVIDENCE

Guilt Phase

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[2] Since Roach was a juvenile at the time these offenses were committed, the jury did not, fix punishment on the non-capital charges. See Code § 16. 1-272.

We will review the evidence in the light most favorable to the Commonwealth, the prevailing party below. *Cheng v. Commonwealth*, 240 Va. 26, 42, 393 S.E.2d 599, 608 (1990). On the evening of December 3, 1993, Mary Ann Hughes was shot and killed in her home about five miles west of Stanardsville. Hughes was standing at her open front door when she was shot. Her body was discovered the next day.

The cause of death was a single shotgun wound to the chest, which caused injury to an artery, the chest wall, and the right lung. Dr. Deborah Kay, the medical examiner who performed the autopsy on Hughes, recovered shotgun pellets and wadding from Hughes's chest. The pellets and wadding were identified as number eight shot from a 12 gauge Remington shot shell case.

The day before the killing, Roach brought a 12 gauge shotgun to a neighbor's house, and he and two friends engaged in shooting the gun in the back yard using number eight shot. The police later recovered from the neighbor's back yard number eight shot that was consistent with a 12 gauge Remington shell case.

Roach and Hughes were also neighbors. Roach helped Hughes with household chores and also spent a great deal of time visiting her. The evidence showed that Roach was familiar with Hughes's habits, and that Hughes customarily deposited her social security check in the bank within the first few days of each month.

On the night she was killed, Hughes's purse, containing a Discover credit card and approximately sixty dollars in cash, was taken from her home. Hughes owned a 1981 Buick Regal, which also was taken.

In the early morning hours of December 4, 1993, Gregory Lee Giuriceo, Jr., a deputy sheriff for Nottoway County, noticed a Buick Regal parked in a parking lot of a shopping

center in Blackstone. Roach was identified by Giuriceo as the operator of the car. After leaving the parking lot, Giuriceo determined that the automobile was registered to Hughes.

Later in the morning of December 4, 1993, Roach attempted to use Hughes's Discover bank card at an automated teller machine in Louisburg, North Carolina. A video tape from the machine showed Roach attempting to withdraw cash from Hughes's account.

On December 5, 1993, Trooper David F. Chavis of the South Carolina Highway Patrol observed a 1981 Buick Regal automobile with Virginia plates which was being driven at 69 miles per hour in a 55 mile per hour zone. He activated the lights on his patrol car and proceeded behind the Buick. The driver of the Buick drove the automobile over to the left shoulder of the road, got out of the car, ran into the woods at the side of the road, and escaped. The driver was wearing clothes which matched the description of the clothes Roach had been seen wearing for the previous two days.

Trooper Chavis impounded the vehicle and traced its ownership to Hughes. Items retrieved from the automobile included Hughes's purse, a blue jacket, a number eight load shotgun shell, and a plastic bag from a Winn-Dixie grocery store. Mahlon Jones, a fingerprint expert employed by the Commonwealth's Division of Forensic Science, identified a latent palm print from the plastic bag as matching Roach's left palm print. In addition, latent fingerprints were recovered from the automobile which matched Roach's fingerprints.

Roach made several telephone calls to his aunt, Annie Betty Dean, while he was in North Carolina and South Carolina. During those telephone conversations, she asked him to "come home and give [himself] up." On December 6, 1993, Roach contacted Sheriff William L. Morris and arranged to come that day with his father to the Sheriff's Department for questioning.

At the Sheriff's Department, Morris advised Roach of his Miranda rights in the presence of Roach's father. Roach waived his rights, and both he and his father signed the waiver form. Sheriff Morris then questioned Roach out of his father's presence. Clarence Roberts, an acquaintance of the Roach family and an employee of the Department of Alcoholic Beverage Control, was present with Morris during the interview.

At first, Roach told Morris that he and a friend, Scott Shifflett, went to Hughes's house on the evening of December 3, 1993. Roach said that Shifflett left the 12 gauge shotgun at the door, and that they entered the house and played Yahtzee with Hughes. Roach recounted that Shifflett then took the keys to the Buick Regal and the two began to leave the house. Roach said that, after he left, Shifflett ran back to the front door, fired one shot, and ran back to the Buick with Hughes's purse. According to Roach, Shifflett said that he had "fired through the roof to scare her."

Roach stated that Shifflett then jumped into the driver's seat of the Buick and they drove to North Carolina. He said that Shifflett must have tried to use Hughes's Discover credit card while Roach was in a Winn-Dixie store making some purchases. Roach also stated that he and Shifflett abandoned Hughes's vehicle in North Carolina.

During the questioning, Morris related to Roach certain evidence that had already been discovered, stating, "With all these discrepancies in the story, I'm finding it really a little difficult to believe some of the things you're telling me." Roberts then told Roach that he knew Roach was lying and that "this is a heavy burden to carry on your shoulders for the rest of your life, if you committed this act you need to tell Sheriff Morris and you need to unburden yourself."

Roach then told Morris,

> I went over there and saw her counting the money and as I was leaving, I had the shotgun laying at the door and I shot her, took the money, the car and left, went to North Carolina. And I cashed – I tried to use – use the credit card but – about four times[,] but it wouldn't work.

When asked where he shot Hughes, he answered, "In the chest."

At trial, Roach offered evidence that there was no gunshot residue on his hands or clothes when he was arrested. He also presented evidence that no footprints at the scene of the crime matched the shoes he was wearing on December 3, 1993. In addition, Barbara Llewellyn, an expert employed by the Division of Forensic Science in the analysis of blood and body fluid, testified that, when Roach was arrested, he had no blood on his clothing, except a "very light stain" on his shirt, despite the fact that the fatal wound perforated one of Hughes's arteries and the pattern of blood splatters indicated that the person who had fired the gun was standing within five feet of Hughes.

Penalty Phase

During the penalty phase of the trial, the Commonwealth put on evidence of Roach's prior Juvenile convictions. Roach had been convicted twice of grand larceny of an automobile. He committed the first larceny in May 1993 and the second in August 1993. In connection with the first automobile larceny, Roach was convicted of reckless driving and failure to stop for a police officer.

In June 1993, Roach was convicted of breaking and entering a residential dwelling and of grand larceny arising out of the burglary. Roach gained entry to the home by breaking a window. He then ransacked the house and stole a .357 magnum pistol.

In August 1993, Roach was sentenced to supervised probation and house arrest under the supervision of his parents at all times. He violated the conditions of this probation when he left the family home and carried a weapon.

When Roach was placed on probation in August 1993, a psychological evaluation was ordered. The psychologist recommended that Roach and his family attend family counseling and that Roach increase his level of academic attainment. Roach had stopped attending school in 1991 when he was 14 years old."

According to John T. Frey, Roach's probation officer, Roach and his family attended counseling sessions at the regional counseling center prior to December 1993. Roach also enrolled in G.E.D. classes in the adult education program offered by Greene County.

Shirley Ann Roach, Roach's mother, testified that she and Roach's father had separated and reconciled their marriage four times during Roach's childhood. She testified that she and her husband requested that Roach be released because he was needed around the house to do chores and to care for his brothers. She also stated that she did not realize that possessing a weapon violated the terms of Roach's probation because the probation papers did not explicitly state this fact.

John Roach, Roach's father, testified that he was frequently absent from home. He also suffered from significant health problems. When Steve Roach was six years old, John Roach sustained a shotgun injury which required him to remain in the hospital for six months. While being treated for the gunshot wound, he contracted Hepatitis C from a blood transfusion. The medication he received for this condition caused mood changes.

John Roach testified that, when his wife left him, life "got worse" for his children. He began drinking heavily and brought young girls into the house in order to make his wife jealous. He stated that the children were present when this occurred and that they did not receive parental supervision. He also stated that Steve Roach had free access to all the guns in the house.

Several family friends and relatives testified on Steve Roach's behalf. Clarence Roberts testified that Roach had performed numerous "odd jobs" for him, and that Roach was "an excellent employee." Tammy Estes, Roach's half sister, stated that Roach often helped his neighbors, including Hughes, cut firewood, cook, and clean their laundry.

Wendell Lamb, the pastor of Roach's church, testified that Roach volunteered his time to help paint and remodel the church and to work at a camp for children in the George Washington National Forest. Lamb conceded that, while Roach was doing volunteer work for the church, he was accused of stealing a watch. Roach and the owner of the watch resolved the dispute privately.

Roach testified on his own behalf. He stated that, shortly after 9:00 p.m. on December 3, 1993, he walked to Hughes's house with his shotgun. When she opened the door, he fired once, walked past her body, and took her purse and the keys to her car. He stated that he then drove to North Carolina and attempted to use her Discover credit card to get cash. Roach testified that he did not know Hughes had died until he spoke by telephone with his aunt.

Roach also testified that, when he went to Hughes's house, he knew she had just received her social security check, knew the location of her purse, and intended to steal both items. However, he stated that he did not intend to hurt her, and that he could not explain "what went . . . through [his] mind." He also testified that he was sorry he had killed Hughes, stating, "I wish I could bring her back."

Dr. Gary Lee Hawk, a forensic psychologist appointed by the court, testified concerning his evaluation of Roach. Hawk met with Roach on six different occasions and spoke with Roach's parents and other family members. Hawk determined that Roach was of average intelligence and had mild depressive symptoms. Hawk found no indication that Roach had suffered any brain injury. He also found no evidence that Roach suffered from any serious mental illness.

Hawk testified that Roach lied to him about a number of things and gave him four different versions of what happened on December 3, 1993. He also stated that Roach was "particularly immature" for his age. Hawk concluded that Roach had poor "impulse control" and "did not show very good ability in many situations to control his emotions or behavior like seventeen-year-old or eighteen-year-old individuals should do."

Hawk related Roach's immaturity to the fact that he did not get the guidance and the structure that children need to mature. Hawk further stated that Roach's probation violation for carrying a weapon was a result of this lack of structure and supervision. He also testified that there was no pattern of violent behavior in Roach's life.

Hawk stated that, in psychological terms, Roach's act of killing a friend arose from the fact that "adolescents in conflict, adolescents in turmoil frequently express extremely strong and angry emotions with very little provocation . . . If it's an immature adolescent, that sort of reaction is more extreme." Hawk stated that "displacement of emotion" occurs when one person or situation makes a person angry, but the feelings and anger are expressed toward someone else.

Hawk stated, "Knowing that this was a woman that [Roach] was close to, and knowing that there was not an existing pattern of this sort of violent offending, and considering what

he told me, it's dynamics like that [which] would explain [the murder] in psychological terms." In addition, Hawk testified that, "in terms of normal development," Impulsiveness diminishes and "doesn't cause problems for the person."

III. ARGUMENTS WAIVED

Because Roach did not address in his briefs assignments of error 15(c), 16(f), and 16(h), he is deemed to have waived them.[3] Rule 5:27. Also, since Roach did not ask the trial court to strike certain prospective jurors for cause, after they heard another prospective juror state a belief that Roach was guilty, he has waived this objection to the empanelment of those jurors. Rule 5:25.[4]

IV. ISSUES PREVIOUSLY DECIDED

Roach has advanced a number of arguments that we have rejected in previous decisions. Finding no reason to modify our previously expressed views, we will reaffirm our earlier decisions and reject the following contentions:

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[3] These assignments of error are:

15(c): Virginia's juvenile transfer statute is unconstitutional as applied.

16(f): The trial court erred in overruling the motion to prohibit the imposition of the death penalty and to strike the capital murder charge on the grounds that the post-sentence report infringes upon the defendant's rights to due process, to confront his accusers, to be free from cruel and unusual punishment, and to effective assistance of counsel.

16(h): Virginia's death penalty statutes as administered deny capital defendants effective assistance

[4] Roach has also argued that he received ineffective assistance of counsel during voir dire based on this occurrence. However, such a claim is not reviewable on direct appeal. *Walker v. Mitchell, 224 Va. 568, 570, 299 S.E.2d 698, 699 (1983); Browning v. Commonwealth, 19 Va.. App. 295, 297, n.2, 452 S.E. 2d3 60, 362, n.2 (1994); see* Acts 1990, ch.74.

A. The denial of a jury instruction that Roach would be required to serve a minimum of twenty-five years before becoming eligible for parole. In *Joseph v. Commonwealth, 249 Va. 78, 84, 452 S. E. 2d 862, 866,* cert. denied, ___ U.S.___, 116 *S.Ct. 204 (1995),* we held that such an instrument is not available to defendants who will be eligible for parole at a future date.

B. The trial court's refusal to limit evidence of juvenile and unadjudicated crimes as background evidence at sentencing. Rejected in *Beaver v. Commonwealth, 232 Va.. 521, 528-29, 352 S.E.2d 342, 346-47,* cert. denied, *483 U.S. 1033 (1987).*

C. The Virginia transfer statute does not provide individualized consideration of a juvenile's moral culpability and maturity. Rejected in *Wright v. Commonwealth, 245 Va. 177, 182-83, 427 S.E.2d 379, 383-84 (1993),* vacated and remanded, ___ U.S. __, *114 S.Ct. 2701 (1994),* aff'd, *248 Va.. 485, 450 S.E.2d 361 (1994),* cert. denied, _ U.S. _, *115 S.Ct. 1800 (1995); Thomas v. Commonwealth, 244 Va.. 1, 7, 419 S.E.2d 606, 609,* cert. denied, *506 US. 958, 121 L. Ed. 2d 343, 113 S.Ct. 421 (1992).*

D. The sentencing verdict form prescribed by Code § 19.2-264(D) renders the jury's option of imposing a life sentence unconstitutionally vague and obscures mitigation evidence. We rejected these contentions in *Stockton v. Commonwealth, 241 Va. 192, 215, 402 S.E.2d 196, 209,* cert. denied, *502 U.S. 902, 116 L. Ed. 2d 231, 112 S.Ct. 280 (1991),* and in *LeVasseur v. Commonwealth, 225 1b. 564, 594-95, 304 S.E. 2d 644, 661 (1983),* cert. denied, *464 U.S. 1063, 79 L. Ed. 2d 202, 104 S.Ct. 744 (1984).* Thus, we find no error in the trial court's refusal to substitute Roach's proposed verdict form for the statutory sentencing verdict form.

E. The death penalty statutes do not give meaningful guidance to jurors that they may impose a death sentence only if they determine beyond a reasonable doubt that aggravating

circumstances outweigh mitigating ones. Rejected in *Breard v. Commonwealth, 248 Va.. 68, 74, 445 S. E. 2d 670, 674-75,* cert. denied, ___ U.S. ___, *115 S.Ct. 442 (1994); Watkins v. Commonwealth, 229 Va.. 469, 490-91, 331 S. E. 2d 422, 438 (1985),* cert. denied, *475 U.S. 1099, 89 L. Ed. 2d 903, 106 S.Ct. 1503 (1986).*

F. Code § 19.2-264.4(C) violates the defendant's rights under the Eighth and Fourteenth Amendments to the United States Constitution because the jury may find future dangerousness based upon unadjudicated crimes. Rejected in *Evans v. Commonwealth, 222 Va. 766, 770, 284 S.E.2d 816, 817-18 (1981),* cert. denied, *455 U.S. 1038 (1982);* see also *Watkins v. Commonwealth, 238 Va. 341, 352, 385 S.E.2d 50, 56 (1989),* cert. denied, *494 U S. 1074, 108 L. Ed. 2d 798, 110 S.Ct. 179 7 (1990).*

G. The capital murder and death penalty statutes as administered are unconstitutional for every reason cited by the majority in *Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S.Ct. 2726 (1972):* In *Fitzgerald v. Commonwealth, 223 Va. 615, 635-36, 292 S.E. 2d 798, 810 (1982),* cert. denied, *459 US. 1228 (1983),* we held that the Virginia capital murder statutes eliminated the constitutional violations identified in Furman. Further, in *Clark v. Commonwealth; 220 Va. 201, 212, 257 S.E.2d 784, 791 (1979),* cert. denied, *444 U.S. 1049 (1980),* we rejected the argument that the Virginia death penalty sentencing statutes violated the restrictions of the Furman holding.

H. The death penalty statutes deny defendants meaningful appellate review and deny defendants equal protection of the law and due process of law because of the single tier of appellate review of death sentences. Rejected in *Payne v. Commonwealth, 233 Va. 460, 473-74, 357 S.E.2d 500, 508,* cert. denied, *484 U.S. 933 (1987).*

V. PRETRIAL MATTERS

A. Juvenile Court Issues

Roach contends that the statutes defining the authority of juvenile court intake officers violate the separation of powers clauses of the Virginia Constitution, Art. I, § 5 and Art. III, § 1. He asserts that, since intake officers are employees of the Department of Youth and Family Services, an executive agency, they are constitutionally prohibited from exercising the judicial powers of determining probable cause, issuing petitions or criminal warrants, or issuing detention orders.

Initially, we note that statutes are presumed to comply with the Virginia and United States Constitutions and will be declared unconstitutional only when their provisions plainly violate either document. *Etheridge v. Medical Ctr. Hosp., 237 Va. 87, 94, 376 S. E. 2d 525, 528 (1989).* In *Winchester & Strasburg R.R. v. Commonwealth, 106 Va. 264, 55 S.E. 692 (1906),* we stated that the separation of the executive, judicial, and legislative branches of government is "indispensable to public liberty." However, we emphasized that the separation required by the Virginia Constitution is not an absolute separation. We held that the branches of government need not "be kept wholly and entirely separate and distinct, and have no common link or dependence. . . The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments." Id. at 270, 55 S.E. at 694 (citations omitted).

The juvenile and domestic relations district court judges share appointment, assignment, and discharge powers over the intake officers with the Department of Youth and Family Services. See Code §§ 16.1-233 and -235. In filing a petition to initiate a criminal case, the intake officer makes a determination that there is probable cause to believe that a juvenile has committed a criminal offense. See Code § 16.1-260. However, the juvenile and domestic relations district court, not the Department of Youth and Family Services, has original

jurisdiction over matters involving the delinquent juvenile. Code § 16.1-24 1. Further, the failure of an intake officer to file a petition does not divest the juvenile and domestic relations district court of jurisdiction over the juvenile. Code § 16.1-260(G).

Thus, juvenile intake officers do not exercise the whole power of the judiciary. Because such officers exercise only a limited judicial function, and the juvenile and domestic relations district court retains actual control over the juveniles, we conclude that the intake officer's authority to issue criminal petitions does not violate the separation of powers guaranteed by the Virginia Constitution.

Next, Roach argues that the circuit court acquired jurisdiction to try him only for the lesser included offense of first degree murder. He asserts that, since the juvenile court did not render a probable cause determination concerning the presence of aggravating circumstances supporting imposition of the death penalty, the circuit court did not acquire jurisdiction to impose the death penalty. We disagree.

Before Roach could be transferred to the circuit court for trial as an adult, the juvenile court was required by former Code § 16.1-269 (now § 16.1-269.1) to determine whether there was probable cause to believe that he committed an offense which would be a felony had it been committed by an adult. The aggravating circumstances required for imposition of the death penalty are not elements of the crime of capital murder. They relate only to the punishment authorized after conviction of the offense. Therefore, the juvenile court was not required to make a probable cause determination of the sufficiency of the evidence in support of the statutory predicates for imposition of the death penalty.

B. Bill of Particulars

Roach filed a motion for a bill of particulars.[5] The trial court granted the motion with respect to paragraph (f) involving unadjudicated allegations of misconduct and "any circumstances of the offense [the Commonwealth] contends are relevant to proof of the [future dangerousness] factor." The court denied the balance of the motion. Roach argues that the trial court's denial of the remaining parts of the motion constitutes error based on the gravity of the penalty sought. We disagree.

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[5] The motion for. a bill of particulars requested that the trial court enter an order directing the Commonwealth:

a) To identify the grounds, and all of them, on which it contends that defendant is guilty of Capital Murder under Va. Code Ann. [§] 18.2-3 1.

b) To identify the evidence, and all of it, upon which it intends to rely in seeking a conviction of Defendant upon the charge of Capital Murder.

c) To identify the aggravating factors, if any, upon which it intends to rely in seeking the death penalty, should defendant be convicted of Capital Murder.

d) If the response to (c) includes statement that Commonwealth intends to prove the "vileness" factor as set out in Va. Code Ann. § 19.2-264.4C, to identify as many of the components of the factor, torture, depravity of mind, aggravated battery on which it intends to offer evidence.

e) If the response to (c) include statements that Commonwealth intends to prove the "vileness" factor as set out in Va. Code Ann. § 19.2-264.4C, to identify every narrowing construction of that factor on which it intends to offer evidence.

f) If the response to (c) include statements that the Commonwealth intends to use to prove the "future dangerousness" factor as set out in Va. Code Ann. § 19.2-264.4C, to identify any unadjudicated allegations of misconduct by defendant upon which it intends to offer evidence and any circumstances of the offense it contends are relevant to proof of the factor.

g) To identify the evidence, and all of it, on which it intends to rely in support of the aggravating factors identified, and all other evidence which it intends to introduce in support of its contention that death is the appropriate punishment for this Defendant.

A defendant is not entitled to a bill of particulars as a matter of right. Code § 19.2-230 provides that a court "may direct the filing of a bill of particulars." Thus, the trial court has discretion whether to require the Commonwealth to file a bill of particulars. *Quesinberry v. Commonwealth, 241 Va. 364, 372, 402 S.E.2d 218, 223,* cert. denied, *502 U.S. 834, 116 L. Ed. 2d 82, 112 S.Ct. 113 (1991).*

If the indictment gives a defendant sufficient "notice of the nature and character of the offense charged so he can make his defense," no bill of particulars is required.[6] *Wilder v. Commonwealth, 217 Va.. 145, 147, 225 S.E.2d 411, 413 (1976).* The indictment in this case met that standard. Therefore, the trial court did not abuse its discretion in denying the balance of Roach's motion. See *Strickler v. Commonwealth, 241 Va.. 482, 490, 404 S. E. 2d 22 7, 233,* cert. denied, *502 U S. 944 (1991).*

C. Voluntariness of Roach's Confession

Roach argues that the trial court erred in refusing to suppress his confession as being involuntary "for purposes of exposing him to the death penalty." Roach asserts that his waiver of Miranda rights was "questionable," and that he made his statements based on the mistaken belief that he would receive the benefit of a lesser penalty in exchange for admitting that he had shot Hughes. He contends that the statements were induced by Sheriff Morris's allegedly misleading remarks such as "the truth is so very, very important to you, to us and to yourself."

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[6] The capital murder indictment alleged that "on or about December 3, 1993, STEVE EDWARD ROACH . . . did, in the County of Greene, unlawfully and feloniously commit capital murder by the willful, deliberate, and premeditated killing of Mary Ann Hughes in the commission of robbery while armed with a deadly weapon, which offense is punishable as a felony in violation of Section 18.231(4) of the Code of Virginia."

In assessing the voluntariness of Roach's statement, we apply a well-established standard of review. In *Gray v. Commonwealth, 233 Va. 313, 356 S.E.2d 157,* cert. denied, *484 U.S. 873, 98 L. Ed. 2d 158, 108 S.Ct. 207 (1987),* we said:

> A defendant's waiver of his Miranda rights is valid only if the waiver is made knowingly, voluntarily and intelligently, *Miranda, 384 U.S. at 475.* Whether a statement is voluntary is ultimately a legal rather than factual question. See *Miller v. Fenton, 474 U.S. 104, 110, 106 S.Ct. 445, 450, 88 L. Ed. 2d 405 (1985).* Subsidiary factual questions, however, are entitled to a presumption of correctness.. Id. *at 112, 106 S.Ct. at 451.* The test to be applied in determining voluntariness is whether the statement is the "product of an essentially free and unconstrained choice by its maker," or whether the maker's will "has been overborne and his capacity for self-determination critically impaired." *Schneckloth v. Bustamonte, 412 US. 218, 225, 36 L. Ed. 2d 854, 93 S.Ct. 2041 (1973).* In determining whether a defendant's will has been overborne, courts look to "the totality of all the surrounding circumstances," *id. at 226,* including the defendant's background and experience and the conduct of the police, *Correll v. Commonwealth, 232 Va. 454, 464, 352 S.E.2d 352, 357 (1987); Stockton, 227 Va. at 140, 314 S. E. 2d at 381. Id.* at 324, 356 S.E.2d at 163.

The record shows that Roach was of average intelligence, and that he telephoned Sheriff Morris to initiate the questioning. Prior to the interrogation, Morris advised Roach and Roach's father of Roach's Miranda rights. Although John Roach was not present during the interrogation, both he and Steve Roach indicated that they understood the Miranda rights and they signed the waiver forms. During the interrogation, there was no mention of the death penalty at any time. Roach stated to

Morris that he was making the statements of his own free will, without pressure of threats or promises.

We also consider the factual findings made by the trial court. The trial court found that Roach "was not intoxicated [and] understood his surroundings and the questions asked of him." The court found that the interrogation atmosphere was not coercive and that Roach had not been threatened in any way. The court found that the entreaties to Roach to tell the truth did not overbear Roach's will. Because these factual findings are supported by the record, we accord them substantial weight in our determination whether Roach's statements were voluntary. *Miller v. Fenton, 474 US. 104, 112, 88 L. Ed. 2d 405, 106 S.Ct. 445 (1985).*

Based on the above evidence and findings, we hold that Roach's statements were voluntary, No threats or promises were made to induce the confession and there is no evidence indicating that the confession was coerced. Instead, the evidence demonstrates that the statements were the product of Roach's free and unconstrained choice.

D. Venue

Roach filed a motion for a change of venue on the basis that the crime, a "high profile" murder in a rural setting, rendered the trial court unable to empanel an impartial jury. The trial court took the motion under advisement and, after the jury was empanelled, overruled the motion.

Roach argues that the trial court erred in denying his motion for a change of venue because the pretrial publicity was widespread and prejudicial. He notes that over 50 percent of the jury pool was familiar with Roach, the victim, members of her family, the Commonwealth's Attorney, or witnesses. The trial court observed, however, that although 31 jurors were stricken for cause, "a large number of those were stricken because of their view concerning the death penalty and not

because of any evidence of bias for or against the accused or the prosecution."

A presumption exists that a defendant can receive a fair trial in the jurisdiction in which the offense occurred. *Stockton, 227 Va. at 137, 314 S.E.2d at 380.* In order to overcome this presumption, a defendant must demonstrate that the citizens of the jurisdiction feel such prejudice against the defendant as is reasonably certain to prevent a fair trial. Id. Further, the decision whether to grant a change of venue lies within the sound discretion of the trial court. *George v. Commonwealth, 242 Va.. 264, 2 74, 411 S. E. 2d 12, 18,* cert. denied, *503 U.S. 973, 118 L. Ed. 2d 308, 112 S.Ct. 191 (1992).*

The fact that there have been media reports about the accused and the crime does not necessarily require a change of venue. *Buchanan v. Commonwealth, 238 Va. 389, 407, 384 S.E.2d 757, 767-68 (1989),* cert. denied, *493 US. 1063, 107 L. Ed. 2d 963, 110 S.Ct. 880 (1990).* Another significant factor the trial court must consider is "the difficulty encountered in selecting a jury." *Mueller v. Commonwealth, 244 Va. 386, 398, 422 S.E.2d 380, 388 (1992),* cert. denied, *507 US. 1043, 123 L. Ed. 2d 498, 113 S.Ct. 1880 (1993).*

Roach did not overcome the presumption that he could receive a fair trial in Greene County. He concedes that only six members of the jury pool were so prejudiced by media coverage that they could not give him a fair trial. Given the relative ease with which the jury was selected, we hold that the trial court did not abuse its discretion in denying Roach's motion for a change of venue.

E. Jury Selection

Roach next argues that the trial court erred in refusing to strike for cause juror Breeden. During voir dire, juror Breeden testified that Daniel Bouton, the Commonwealth's Attorney, formerly had represented him in a legal matter. Although

Bouton was not representing Breeden in any matter at the time of trial, Breeden stated that he would regard Bouton as his personal attorney. Breeden also testified that his former connection with Bouton would not affect his ability to be impartial. Roach argues that this relationship presented an inherent 'conflict, and that Breeden was more likely to be influenced by Bouton's closing argument because he was accustomed to looking to Bouton for legal guidance.

The trial court's decision whether to strike a juror for cause is a matter submitted to its discretion and will not be disturbed on appeal unless the refusal constitutes manifest error. Stockton, *241 Va.. at 200, 402 S.E. 2d at 200.* Further, in *Calhoun v. Commonwealth, 226 Va. 256, 263, 307 S. E. 2d 896, 900 (1983),* we refused to adopt a per se rule disqualifying a juror solely because the juror had been represented by the Commonwealth's Attorney at some time in the past.

In the present case, the trial court had the opportunity to observe Breeden's demeanor when evaluating his statement that his ability to be impartial would not be affected by his former association with Bouton. Nothing in the record suggests that the trial court abused its discretion in accepting Breeden's statement that he could be impartial in the trial of the case. Thus, we find no merit in Roach's argument.[7]

VI. GUILT PHASE ISSUES

Roach argues that the trial court erred in refusing to set aside the verdict of capital murder based on the alleged absence of evidence corroborating his confession that he was the "triggerman." Roach asserts that his confession was inadequate as a matter of law to establish that he was the immediate

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[7] We also find no merit in Roach's claim that his Fourteenth Amendment rights were violated by the trial court's refusal to strike Breeden for cause. The record before us offers no support for such a claim.

perpetrator of the killing. In addition, Roach argues that the trial court erred in failing to instruct the jury that the "triggerman" portion of his confession had to be corroborated before he could be convicted of capital murder. He also assigns as error the court's refusal of an instruction defining a principal in the second degree, as well as its refusal of an instruction that only the immediate perpetrator of a killing can be convicted of capital murder. We disagree with the above assertions.

The Commonwealth need not corroborate an entire confession, but it must corroborate the elements of the corpus delicti. *Watkins, 238 Va.. at 348, 385 S.E.2d at 54.* In the present case, the Commonwealth met its burden of corroborating the corpus delicti of capital murder.

The corpus delicti of a homicide consists of "proof of the victim's death from the criminal act or agency of another person." *Swann v. Commonwealth, 247 Va. 222, 236, 441 S.E.2d 195, 205,* cert. denied, *115 S.Ct. 234 (1994).* The testimony of Dr. Kay, the medical examiner, established that Hughes died from a shotgun wound to the chest. There was no evidence that the wound was self-inflicted. Further, the Commonwealth produced evidence which tended to corroborate that Roach was the "triggerman" in the killing.

The Commonwealth showed that Roach owned a 12 gauge shotgun and that he had shot number eight shot from it the day before the murder. The shot and wadding retrieved from Hughes's chest were consistent with the type used in Roach's weapon. The Commonwealth also produced evidence taken from Hughes's car including a number eight shot shell casing, as well as latent fingerprints which matched Roach's fingerprints.

The corpus delicti of robbery, the predicate offense of this capital murder charge, was also corroborated by evidence independent of Roach's confession. The autopsy report revealed evidence of violent force used on Hughes, and the

videotape from the automatic teller machine showed Roach attempting to use Hughes's credit card. Further, as stated above, latent fingerprints matching Roach's fingerprints were found in Hughes's vehicle, which was taken from the murder scene.

Since the Commonwealth sufficiently corroborated the corpus delicti of capital murder, the trial court did not err in denying Roach's motion to set aside the verdict. Likewise, the court did not err in failing to instruct the jury that Roach's confession that he was the "triggerman" must be corroborated since the court had already correctly determined, as a matter of law, that the confession was sufficiently corroborated to go to the jury. See *Watkins, 238 Va. at 350-51, 385 S. E. 2d at 55.*

Finally, there was no error in the trial court's refusal to give a jury instruction that only the immediate perpetrator of the killing can be found guilty of capital murder. There was no evidence that Roach acted with an accomplice other than the first version of his confession, which he later recanted. Also, since his theory that an other person was the triggerman was unsupported by the evidence, Roach was not entitled to an instruction defining a principal in the second degree. See *Eaton v Commonwealth, 240 Va. 236, 255, 397 S. E. 2d 385, 397 (1990),* cert. denied, 502 US. *824, 116 L. Ed. 2d 60, 112 S.Ct. 88 (1991).*

V11. PENALTY PHASE ISSUES

Juror Question

Roach contends that the jury prematurely began deliberations during the penalty phase of the trial. In support of his claim, he notes that, after the jury had been instructed but before it began deliberating, one juror asked the trial court, "Does life in prison mean with no chance of parole or truly life in prison, or is he eligible for parole?"

At this point, Roach's counsel informed the trial court that "unless the possibility can be excluded that this question originated solely with one juror, the defense would respectfully move for a mistrial." The trial court declined to question the jury on the matter, but gave the jury an additional instruction stating, "Having found the defendant guilty, you should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourself with what may happen afterwards."

We find no merit in Roach's claim. The question posed by the individual juror does not indicate that the jury had begun deliberating Roach's penalty. Thus, the trial court did not abuse its discretion in denying the mistrial motion.

Jury Instructions

Roach argues that the trial court erred in refusing to instruct the jury on the meaning of the word "probability," in the context of the "future dangerousness" provision of Code § 19.2-264.2. We disagree. In *Mickens v. Commonwealth, 247 Va. 395, 403, 442 S.E.2d 678, 684,* vacated on other grounds, 513 U.S. _, 115 S.Ct. *307 (1994),* we held that the word "probability," as it appears in the statutory context of the "future dangerousness" predicate, is not ambiguous. Therefore, Roach was not entitled to a jury instruction defining that word. See *Louisi v. Commonwealth, 212 Va.. 848, 850, 188 S. E. 2d 206, 207, 208 (1972).*

Roach next asserts that he was denied his Fourteenth Amendment right of equal protection, because he was refused an instruction informing the jury that, if he received a life sentence on the capital murder charge, he would not be eligible for parole for 25 years. In contrast, Roach argues, certain "adjudicated recidivists" are entitled to an instruction informing the jury that they would be ineligible for parole if given a life sentence for the same offense. See *Simmons v. South Carolina, 512 U.S. 2198 (1994).*

As stated above, in applying the rule of Simmons, this Court has held that a defendant charged with capital murder is entitled to an instruction regarding parole eligibility only when (1) the defendant's future dangerousness is in issue, and (2) the defendant is ineligible for parole at the time he is sentenced on the capital murder charge. *Wright, 248 Va. at 487, 450 S.E.2d at 362.* Since Roach does not contend that he was ineligible for parole when he was sentenced, he was not entitled to an instruction regarding parole eligibility. Moreover, Roach has not suffered a denial of equal protection from the refusal of such an instruction, because a non-suspect classification is involved here and that classification "rationally advances a reasonable and identifiable governmental objective." *Schweiker v. Wilson, 450 U.S. 221, 235, 67L. Ed. 2d 186, 101 S.Ct. 1074 (1981);* see *Evans, 228 Va. at 481, 323 S.E.2d at 122.*

When a "recidivist" is ineligible for parole at the time of sentencing on a capital murder charge, this fact is relevant to the issue whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society." See Code § 19.2-264.2(l). In contrast, the fact that Roach would be eligible for parole in 25 years is not probative of this issue. This fact could do nothing more than invite the jury to speculate on the effect incarceration might have on Roach. The elimination of such improper speculation provides a rational basis supporting the denial of the requested instruction. Thus, Roach's equal protection claim fails. See *Schweiker* at 235.

Standard of Proof for Future Dangerousness

Roach argues that, because this Court has never reversed a death sentence based on insufficiency of evidence of "future dangerousness," "Virginia cases articulate no standards to confine the reach of" that sentencing factor. Roach contends that such standards must be articulated.

We disagree, because the conclusion Roach urges ignores the central purpose of Code § 19.2-264.2, that of individualized consideration of the defendant and the crime committed. Under the direction of Code § 19.2 -264.2, the trier of fact may not impose the death penalty unless it finds "future dangerousness" beyond a reason-able doubt, upon consideration of all relevant evidence of the defendant's background, as well as the crime for which the defendant is being sentenced. This individualized consideration necessarily precludes the articulation of precise requirements for a finding of "future dangerousness." Moreover, a defendant is protected from an unsupported finding of "future dangerousness" by the right to appellate review of the sufficiency of the evidence in support of that finding.

Sufficiency of Evidence of "Future Dangerousness"

Under Code § 19.2-264.2, the death penalty may not be imposed unless the trier of fact shall find one or both of two aggravating factors we have referred to as "future dangerousness" and "vileness." *Yeatts v. Commonwealth, 242 Va. 121, 139, 410 S.E.2d 254, 265 (1991),* cert. denied, *503 U.S. 946, 117 L. Ed. 2d 639, 112 S.Ct. 1500 (1992).* In the present case, the jury found "future dangerousness," meaning "there is a probability that [Roach] would commit criminal acts of violence that would constitute a continuing serious threat to society." Code § 19.2-264.2.

Roach argues that the Commonwealth failed to produce sufficient proof of his "future dangerousness." He first emphasizes that the only expert psychological testimony at the penalty phase was given by Dr. Hawk, who stated that there was no pattern of violent behavior in Roach's life. Although he concedes that "all of [his] misconduct arguably involved potential for violence," Roach asserts that the Commonwealth never introduced evidence of any actual or threatened violence in his past behavior. He also notes that his misconduct occurred only during the period of his family's "disintegration."

Further, given his difficult family background and the fact that he had only one probation violation prior to December 3, 1993, Roach asserts that the jury's finding of "future dangerousness" is unsupported by the evidence. We disagree.

The evidence in the penalty phase showed that, within approximately a seven-month period prior to Roach's murder of Hughes, he had broken and entered a private residence, stolen a .357 Magnum pistol from that dwelling, committed two automobile larcenies, and violated a condition of his probation.

As this Court emphasized in Yeatts, burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation - the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence. *242 Va.. at 140, 410 S.E.2d at 266* (citations omitted). Thus, Roach's commission of burglary, and his theft of a.357 Magnum pistol during the burglary, were relevant evidence in determining his "future dangerousness."[8] See id.

The jury also heard evidence from John Frey, Roach's probation officer, that Roach violated his probation in carrying a shotgun. Violent behavior arose from this probation violation when Roach used the shotgun to kill Mrs. Hughes. Therefore, both the fact of the violation and its particular nature were relevant evidence in the jury's determination of "future dangerousness."

Most significantly, this Court has recognized that the facts and circumstances surrounding the capital murder alone may

[8] The fact that the dwelling Roach broke and entered was unoccupied at the time of the offense is a fortuitous circumstance that does not affect our analysis here.

be sufficient to support a finding of "future dangerousness." See *Murphy v. Commonwealth*, 246 1h. 136, 145, 431 S. E. 2d 48, 53, cert. denied, 5 10 U. S. -, 114 S.Ct. 336 (1993). Here, Roach killed a defenseless, 70-year-old neighbor because he wanted her money. He admitted that Mrs. Hughes had always been kind to him. Yet, after shooting her at point-blank range, he walked past her body, robbed her of her money and car keys, and left her lying on the floor.

From this evidence, the jury was entitled to conclude that Roach placed little value on human life and was willing to kill even a defenseless friend in order not to be identified as the perpetrator of a robbery. Given Roach's escalating pattern of criminal behavior culminating in the murder of Mrs. Hughes, the jury had sufficient evidence from which to find, beyond a reasonable doubt, that there was a probability that Roach would commit criminal acts of violence that would constitute a continuing serious threat to society.

Our conclusion in this regard is not altered by Dr. Hawk's testimony. Although he testified that Roach had no pattern of violent behavior in his life, the jury was entitled to weigh this opinion in conjunction with all the evidence of Roach's criminal behavior, including the facts and circumstances surrounding his robbery and murder of Mrs. Hughes.

Roach also argues that the "trial court erred [by] finding that no good cause had been shown to set aside the sentence of death and impose a sentence of imprisonment for life." In reviewing the record pursuant to Code § 19.2-264.5, the trial court is vested with discretion, upon good cause shown, to set aside the sentence of death. Here, the record shows that the trial court reviewed all evidence presented in both mitigation and aggravation of the offense. Based on the evidence presented, we cannot conclude that the trial court erred in finding an absence of "good cause shown" to set aside the jury verdict of death and to impose a sentence of life imprisonment.

VIII. SENTENCE REVIEW

Under Code § 17-110. 1 (C)(1) and (2), we are required to determine "whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor" and "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

A. Passion and Prejudice

Roach contends that the sentence of death was imposed under the influence of passion, prejudice, or other arbitrary factor. In support of his argument, he restates several of the errors assigned above. Since we have found no error in the trial court's rulings, we reject this argument. See *Pope v. Commonwealth,* 234 Va. 114, 127, 360 S.E.2d 352, 360 (1987), cert. denied, 485 U.S. 1015, 99 *L. Ed.* 2d 716, 108 S.Ct. 1489 (1988); *Wise v. Commonwealth,* 230 Va. 322, 335, 337 S.E. 2d 715, 723 (1985), cert. denied, 475 US. 1112, *89 L.* Ed. 2d 921, 106 S.Ct. 1524 (1986). Additionally, our independent review of the entire record fails to disclose that the jury's death sentence "was imposed under the influence of passion, prejudice or any other arbitrary factor." Code § 17-110.1(C).

B. Excessiveness and Proportionality

Roach contends that the death sentence is excessive and disproportionate to those imposed in similar cases. He argues that comparable death sentence cases involve "fact patterns more aggravated as to (1) surrounding circumstances of the offense, (2) age and background of the defendant and (3) unrebutted defense evidence offered in mitigation." With regard to evidence in mitigation, Roach relies primarily on Dr. Hawk's testimony and the other testimony concerning Roach's school, work, and family life.

In conducting the proportionality review, we consider "whether other sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant." *Jenkins v. Commonwealth, 244 Va. 445, 461, 423 S.E.2d 360, 371 (1992),* cert. denied, 507 U.S. *1036, 123 L. Ed. 2d 483, 113 S.Ct. 1862 (1993).* With this purpose in mind, we have compared the record in 17, this case with the records in other capital murder cases to determine whether the death penalty imposed here is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Code § 17-110. 1 (C)(2).

Here, the jury based its sentence of death only on the "future dangerousness" predicate. Therefore, in making our proportionality determination we have given particular consideration to other capital murder cases in which robbery was the underlying felony and the death penalty was based only on the "future dangerousness" predicate.

Those cases were compiled in *Yeatts, 242 Va. at 143, 410 S.E.2d at 267-68,* and supplemented in *Chichester v. Commonwealth, 248 Va. 311, 332-33, 448 S.E.2d 638, 652 (1994),* cert. denied, ___ U. S. ___, *115 S.Ct. 1134 (1995).* The following additional cases involving. robberies and findings of "future dangerousness" were decided after *Chichester* and have been considered by *us: Chandler v. Commonwealth, 249 Va. 270, 455 S.E.2d 219,* cert. denied, ___ U.S. ___, *116 S.Ct. 233 (1995); Joseph, 249 1b. 78, 452 S.E.2d 862.* We have also reviewed the records in capital murder cases in which robbery was the underlying offense and a sentence of life imprisonment was imposed.

Based on this review, we conclude that, while there are exceptions, juries in this Commonwealth generally impose the death sentence for crimes comparable or similar to Roach's murder of Mrs. Hughes. Roach killed an elderly, defenseless friend with a shotgun at point blank range in the process of

robbing her of a portion of her social security funds. This crime, like the other death sentence crimes we have reviewed, shows extreme cruelty and lack of respect for human life.

In addition, although there was evidence in mitigation concerning Roach's status as a 17-year-old offender and his family background, the present case also involved significant evidence in aggravation of the offense. As stated above, Roach had been found guilty of four felonies in the seven-month period prior to the commission of this offense. Although he had been on supervised probation since August 1993, this rehabilitative measure did not deter Roach from carrying a weapon in violation of the terms of his probation. Moreover, his use of this weapon to kill Mrs. Hughes represented the ultimate failure of rehabilitative efforts on his behalf. Given this escalating pattern of criminal behavior, which culminated in the commission of the present offense, we conclude that the imposition of the death penalty in this case is neither excessive nor disproportionate to the penalty imposed in comparable cases.

IX. CONCLUSION

We find no reversible error in the issues presented here. Having reviewed Roach's sentence of death pursuant to Code § 17-110. 1, we decline to commute the sentence of death. Accordingly, we will affirm the judgment of the trial court.

Affirmed.

117 S.Ct. 365 (1996)

Steve Edward ROACH, petitioner,
v. VIRGINIA.
No. 96-5654.
Oct. 21, 1996

Case below, 251 Va. 324, 468 S.E.2d 98.

Petition for writ of certiorari to the Supreme Court of Virginia denied.

118 S.Ct. 713 (1998)

Steve Edward ROACH, petitioner,
v. Ronald J. ANGELONE, Virginia Department of Corrections.
No. 97-6601.
Jan. 12, 1998.

Petition for writ of certiorari to the Supreme Court of Virginia denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

STEVE EDWARD ROACH,	)	
	)	
Petitioner,	)	Civil Action No. 97-0693-R
	)	
v.	)	FINAL ORDER
	)	
RONALD ANGELONE,	)	By: Samuel G. Wilson
	)	
Respondent.	)	Chief United States District Judge
	)	

In accordance with the written Memorandum Opinion entered this day, it is hereby

ORDERED AND ADJUDGED

that Steve Edward Roach's petition under 28 U.S. C. § 2254 for writ of habeas corpus is hereby DISMISSED. This action is stricken from the active docket of the court.

ENTER: This 29th day of July, 1998.

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

STEVE EDWARD ROACH,	)	
	)	
Petitioner,	)	Civil Action
	)	No. 97-0693-R
	)	MEMORANDUM
	)	OPINION
v.	)	
	)	
RONALD ANGELONE,	)	By: Samuel G.
	)	Wilson
Respondent.	)	Chief United
	)	States District
	)	Judge
	)	

Petitioner Steve Edward Roach brings this petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging his conviction and sentence of death for the capital murder of Mary Hughes. Roach was seventeen years old when he murdered and robbed Hughes, his elderly neighbor and friend. Although Roach concedes that he committed a terrible murder for which he deserves substantial punishment, he argues that the imposition of the death penalty on a juvenile offender with no prior history of physical acts of violence for a murder that involved no more than the minimum necessary to accomplish the act is unprecedented in Virginia. He maintains that his death sentence is unconstitutional for a variety of reasons. However persuasive the court finds Roach's arguments that the death penalty is not warranted in his case, this court cannot substitute its view of the facts for that of the jury that sentenced Roach to death or the state courts that imposed and affirmed the sentence. The court has conducted the limited review permissible in federal habeas and concludes

that Roach was not sentenced to death in violation of a clearly established constitutional right. Accordingly, the court must dismiss Roach's petition.

Roach does not dispute that he murdered and robbed Mary Hughes on the evening of December 3, 1993. Roach shot Hughes once in the chest as she stood at the front door of her home. He then stole her purse and her car. Roach fled in the car to North Carolina, where he attempted to withdraw cash from an automatic teller machine using one of Hughes' credit cards. Roach then continued on to South Carolina. When a South Carolina police officer stopped him for speeding, Roach ran into the woods. Roach subsequently returned to Virginia and turned himself in to the Sheriff's Department in Greene County. Although Roach initially told police that someone else shot Hughes, he eventually confessed to shooting and robbing Hughes.

The Commonwealth issued juvenile petitions against Roach for murder, robbery, and the use of a firearm in the commission of murder. On May 13, 1994, following a transfer hearing, the Greene County Juvenile and Domestic Relations Court ("the juvenile court") certified Roach to stand trial as an adult and transferred the matter to the Circuit Court of Greene County ("the trial court"). After the trial court remanded the case to the juvenile court for further proceedings, the juvenile court conducted a second transfer hearing and again certified Roach to stand trial as an adult. A Greene County grand jury indicted Roach on October 11, 1994, for capital murder in violation of Virginia Code § 18.2-31(4), robbery in violation of Virginia Code § 18.2-58, and the use of a firearm in the commission of murder in violation of Virginia Code § 18.2-53.

I.

The guilt phase of Roach's trial began on February 27, 1995. The jury found Roach guilty of all charges. The penalty phase of the trial took place on March 3, 1995. The jury found that Roach presented a future danger to society and

recommended a sentence of death.[1] On May 9, 1995, the trial court sentenced Roach to death in accordance with the jury's verdict. The trial court also sentenced Roach to life in prison for robbery and three years in prison for the use of a firearm in the commission of murder.

The Supreme Court of Virginia affirmed the judgment of the trial court on March 1, 1996, Roach v. Commonwealth, 468 S.E.2d 98 (Va. 1996), and denied rehearing on April 19, 1996. The United States Supreme Court denied Roach's petition for writ of certiorari on October 21, 1996. Roach v. Virginia, 117 S.Ct. 365 (1996). Roach then filed a petition for writ of habeas corpus in the Supreme Court of Virginia, That court dismissed the petition on April 30, 1997, and denied rehearing on August 1, 1997. On January 12, 1998, the United States Supreme Court denied Roach's petition for writ of certiorari. Roach v. Angelone 118 S.Ct. 713 (1998). Roach filed his amended federal petition in this court on March 9, 1998.

II.

Because Roach filed his federal petition after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA"), the court must apply the AEDPA's deferential standard of review, See Lindh v. Murphy, 117 S.Ct. 2059, 2068 (1997). The AEDPA provides:

> An application for a writ of habeas corpus on behalf of person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that as adjudicated on the merits in State Court proceedings unless the adjudication of the claim –

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[1] The trial court found that the evidence to support the vileness predicate was insufficient as a matter of law and allowed the case to go to the jury on the future dangerousness predicate only.

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,

28 U.S.C. § 2254(d). Under subsection (1), a federal court may grant habeas relief on an issue only "when the state courts have decided the question by interpreting or applying the relevant [Supreme Court] precedent in a manner that reasonable jurists would all agree is unreasonable." Green v. French, 143 F.3d 865, 870 (4th Cir. 1998).

III.

Roach first argues that the trial court violated his right to due process when it failed to instruct the jury properly on the requirement of unanimity in sentencing. Roach raised this claim for the first time as claim I(H) in his petition for writ of habeas corpus in the Supreme Court of Virginia. The Supreme Court of Virginia found the claim procedurally barred under the rule of Slayton v. Parrigan, 205 S.E.2d 680, 682 (Va. 1974) (holding that claims that could have been, but were not, raised on direct appeal are barred from consideration on habeas). If, as in this case, a state court expressly denies a claim based on an adequate and independent state procedural default rule, the claim is barred from federal review. Coleman v. Thompson, 501 U.S. 722, 728 (1991). The rule in Slayton provides an adequate and independent basis for barring federal review. Id. Therefore, the claim is now defaulted from federal review

absent a showing of actual innocence or cause and prejudice. Id. at 729-30.

Roach does not assert that he is actually innocent. Insofar as he argues ineffective assistance of counsel as cause for his procedural default, the court finds, for reasons stated in Section IX, infra, that his related ineffective assistance of counsel claim is without merit. Therefore, Roach's claim of ineffective assistance of counsel cannot establish cause to excuse his procedural default. See Murray v. Carrier, 477 U.S. 478, 488-89 (1986). Accordingly, the court must deny relief on this claim.

IV.

Next, Roach argues that he was denied due process in violation of the Fourteenth Amendment when the trial court failed to instruct the jury that Roach, if sentenced to life in prison, would not be eligible for parole under Virginia law for twenty-five years.[2] In Simmons v. South Carolina, 512 U.S. 154 (1994), the United States Supreme Court held that, when the state seeks the death penalty based on a defendant's future dangerousness, the defendant has a due process right under the Fourteenth Amendment to inform the jury, either through argument or instruction, that he is ineligible for parole as a matter of law, Id. at 162. Roach now argues that he was entitled, pursuant to the holding in Simmons, to inform the jury that he would not be eligible for parole for twenty-five years if it recommended a life sentence.

When Roach raised this claim on direct appeal, the Supreme Court of Virginia held that Roach was not entitled to

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[2] Following instructions at the penalty phase of the trial, a juror inquired, "Does life in prison mean with no chance of parole or truly life in prison, or is he eligible for parole?" (Tr. March 3, 1995 at 1085). In response to this question, the trial court instructed the jury that it should "impose such punishment as [it feels] is just under the evidence and within the instructions of the Court" and advised the jury "not to concern [itself] with what may happen afterwards. " (Tr. March 3, 1995 at 1089).

an instruction regarding his parole eligibility. Roach, 468 S.E.2d at 105. Relying on its prior decision in Joseph v. Commonwealth, 452 S. E. 2d 862 (Va. 1995), the Supreme Court of Virginia held that the rule of Simmons applied only if the defendant was ineligible for parole. Roach, 468 S.E.2d at 111. The court concluded that Roach, who would be eligible for parole after serving twenty-five years, was not entitled to an instruction regarding his parole eligibility. Id.

To obtain relief on this claim, Roach must demonstrate that no reasonable jurist could interpret the rule of Simmons as limited to those defendants who are ineligible for parole under state law. See Green, 143 F.3d at 870. Roach has not met this burden. First, the court observes that strong support for the Supreme Court of Virginia's interpretation of Simmons is found in the text of the Simmons opinion itself. The holding of Simmons is defined by Justice O'Connor's concurring opinion. Townes Y. Murray 68 F.3d 840, 849-50 (4th Cir. 1995). Justice O'Connor wrote, "In a state in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact. " Simmons, 5 12 U.S. at 176 (O'Connor, J., concurring). In addition, several federal courts interpreting Simmons have limited its application to defendants who are ineligible for parole. See Allridge v. Scott, 41 F.3d 213, 221-222 (5th Cir. 1994); see also Ingram v. Zant, 26 F.3d 1047, 1054 n.5 (11th Cir. 1994). These decisions, as well as the text of Simmons itself, demonstrate that the Supreme Court of Virginia's decision was reasonable. See Fitzgerald v. Green, 1998 WL 388405, at *8 (4th Cir. July 13, 1998) (rejecting similar claim).

A recent opinion by Justice -Stevens offers some support for Roach's position that the rule of Simmons should apply to defendants who are eligible for parole. Justice Stevens, joined by three other justices, noted the "obvious tension" between Simmons and a Texas law prohibiting defendants who are eligible for parole from presenting evidence regarding their parole eligibility to the jury. Brown v. Texas, 118 S.Ct. 355

(1997) (opinion of Stevens, J., respecting denial of certiorari). The Brown opinion only confirms that the correct interpretation of Simmons is open to debate among reasonable jurists. However compelling Roach's argument that the logic behind the decision in Simmons applies equally to his case, the court cannot find that the interpretation of Simmons adopted by the Supreme Court of Virginia is contrary to, or an unreasonable application of, clearly established federal law as deter-mined by the United States Supreme Court. Accordingly, the court must deny relief on this claim.

V.

Roach next asserts that Virginia's juvenile transfer policy violates the Eighth Amendment because it does not require judicial consideration of a juvenile defendant's maturity and moral responsibility before he is compelled to stand trial as an adult for capital murder. The Supreme Court of Virginia rejected this claim based on its prior decisions in Wright v. Commonwealth, 427 S.E.2d 379 (Va. 1993), vacated on other grounds, 114 S.Ct, 2701 (1994), and Thomas v. Commonwealth, 419 S.E.2d 606 (Va. 1992). In these cases, the Supreme Court of Virginia held that "the Constitution does not require transfer hearings or additional procedural safeguards for juveniles tried for capital offenses." Wright, 427 S.E.2d at 384 (citing Thomas, 419 S.E.2d at 609). Roach cannot obtain relief on this claim unless he demonstrates that this holding by the Supreme Court of Virginia was unreasonable in light of clearly established federal law as decided by the United States Supreme Court. See Green, 143 F.3d at 870. Notwithstanding Roach's assertions to the contrary, the United States Supreme Court has never expressly held that a juvenile capital offender is entitled to individualized consideration of his moral culpability prior to standing trial as an adult. Roach's reliance on a single statement in Justice Scalia's opinion in Stanford v. Kentucky, 492 U.S. 361 (1989), is unavailing. In Stanford, the Supreme Court addressed whether the Eighth Amendment prohibits the execution of sixteen- or seventeen-year-old capital offenders. Justice Scalia,

discussing why laws that prohibit persons under age eighteen from engaging in conduct such as drinking alcoholic beverages or driving were not relevant to the issue before the Court, noted that the criminal justice system provides individualized consideration of a defendant's maturity. Justice Scalia observed:

> In the realm of capital punishment in particular, "individualized consideration [is] a constitutional requirement," Lockett v. Ohio, 438 U.S. 586, 605 (1978) (opinion of Burger, C.J.) (footnote omitted); see also Zant v. Stephens, 462 U.S. 862, 879 (1983) (collecting cases), and one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's age, see Eddings v Oklahoma, 455 U.S. 104, 115-116 (1982). Twenty-nine States ... have codified this constitutional requirement in laws specifically designating the defendant's age as a mitigating factor in capital cases. Moreover, the determinations required by juvenile transfer statutes to certify a juvenile for trial as an adult ensure individualized consideration of the maturity and moral responsibility of 16- and 17 year-old offenders before they are even held to stand trial as adults.

Id. at 375 (footnotes omitted). Justice Scalia did not state that juvenile transfer statutes which do not provide for individualized consideration violate the Constitution. A reasonable jurist could conclude, therefore, that the Constitution does not require a judicial determination of a juvenile offender's moral culpability and maturity before the state may try the juvenile as an adult for a capital crime.[3] In fact, based on Justice Scalia's reference to the individualized

[3] The court also notes that the portion of Justice Scalia's opinion on which Roach relies is joined by only three other justices.

consideration given to a capital defendant's age at sentencing, the Supreme Court of Virginia reasonably could have concluded that Virginia's capital sentencing scheme, which provides that age may be considered as a mitigating factor at sentencing, satisfied the constitutional requirement of individualized consideration.[4] The court concludes that Roach has not demonstrated that the Supreme Court of Virginia's adjudication of this claim conflicted with clearly established federal law as decided by the United States Supreme Court. The court, accordingly, must deny relief on this claim.

VI.

Next, Roach alleges that he was denied due process in violation of the Fourteenth Amendment when the trial court refused to "life-qualify" the jury. Roach first raised this claim in his petition for writ of habeas corpus in the Supreme Court of Virginia as claim I(B). The Supreme Court of Virginia, applying the rule in Slayton, found the claim to be procedurally defaulted. The claim, therefore, is barred from federal review absent a showing of actual innocence or cause and prejudice. See Coleman, 501 U.S. at 728. Roach does not claim actual innocence and, for reasons discussed in Section IX, infra, the court finds that his related ineffective assistance of counsel claim is meritless. Roach thus has failed to overcome his procedural default, Murray, 477 U.S. at 489-90, and the court denies relief on this claim.

VII.

Roach next challenges the sufficiency of the evidence to prove future dangerousness. To establish the existence of this aggravating factor, the Commonwealth must prove beyond a reasonable doubt "a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society, " Va. Code § 19.2-264.2 (Michie 1995).

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[4] Virginia Code § 19.2-264.4(B) provides that the defendant's age at the time of the offense may be considered as a mitigating factor.

A district court reviews the sufficiency of the evidence to prove an aggravating factor under the standard of review established in Jackson v. Virginia, 443 U.S. 307 (1979). See Turner v. Williams, 35 F.3d 872, 894 (4th Cir. 1994). Under this standard, the court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements ... beyond a reasonable doubt." Jackson, 443 U.S. at 319. The district court must not substitute its view of the facts for that of the fact-finder. Tuggle v. Thompson, 57 F.3d 1356, 1369 (4th Cir.), vacated on other grounds, 516 U.S. 10 (1995).

At the penalty phase of Roach's trial, the jury heard evidence that, during the seven-month period preceding the murder of Hughes, Roach broke and entered a residence from which he stole a .357 Magnum pistol, twice committed larceny of an automobile, and violated the conditions of his probation by carrying a shotgun, which he later used to murder Hughes. The jury could also consider the evidence of the capital murder itself, which involved the killing for money of an elderly woman whom Roach considered his friend. As the Supreme Court of Virginia concluded, a reasonable jury could find, based on this evidence, that "Roach placed little value on human life and was willing to kill even a defenseless friend in order not to be identified as the perpetrator of a robbery." Roach, 468 S.E.2d at 112.

Roach argues that this evidence was insufficient to prove future dangerousness because his conduct, however egregious, involved nothing more than the minimum necessary to accomplish the murder, and his criminal history included no prior physical acts of violence. Although this court might not have reached the same conclusion as the fact finder in this case, this court must not substitute its view of the evidence for that of the jury." See Tuggle, 57 F.3d at 1369. The court cannot find that the Supreme Court of Virginia's conclusion that this evidence, viewed in the light most favorable to the Commonwealth, was sufficient to prove future dangerousness

conflicted with clearly established federal law as determined by the United States Supreme Court. Accordingly, the court must deny relief on this claim.[5]

VIII.

Roach next argues that the Supreme Court of Virginia failed to conduct meaningful proportionality review of his sentence in violation of the Eighth and Fourteenth Amendments. Insofar as Roach argues that the Eighth Amendment requires states to conduct proportionality review of death sentences, his argument is without merit. Proportionality review is not mandated under the United States Constitution, Pulley v. Harris, 465 U.S. 37, 50-51 (1984). Also without merit is Roach's argument that the failure of the Supreme Court of Virginia to conduct the state-mandated proportionality review in a meaningful manner constitutes a violation of the due process clause of the Fourteenth Amendment. The inadequacy of state court's proportionality review is not a valid ground for federal habeas relief. Buchanan v. Angelone, 103 F.3d 344, 350-51 (4th Cir. 1996), aff'd, 118 S.Ct. 757 (1998); See Peterson v. Murray, 904 F.2d 882, 887 (4th Cir. 1990) (state court's erroneous application of state law is not a grounds for federal habeas relief).

Even assuming that the failure by the Supreme Court of Virginia to conduct its proportionality review in a meaningful manner could, under some circumstances, amount to a violation of the Fourteenth Amendment, Roach has not demonstrated that the Supreme Court of Virginia's review of Roach's sentence was so deficient as to amount to a federal constitutional violation. Under Virginia law, the Supreme Court of Virginia reviews every death sentence to determine:

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[5] Insofar as Roach argues that Virginia's future dangerousness aggravating factor is unconstitutional because it fails to channel or limit a jury's discretion to impose the death penalty, his argument is meritless. See Giarratano v. Procunier, 891 F.2d 483, 489-90 (4th Cir. 1989) (holding that Virginia's future dangerousness predicate is constitutional).

> 1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and
>
> 2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Va. Code § 17-110.1 (C). The Supreme Court of Virginia compared Roach's case with the record of other capital murder cases in Virginia, giving "particular consideration to other capital murder cases in which robbery was the underlying felony and the death penalty was based only on the 'future dangerousness' predicate." Roach, 468 S.E.2d at 113. Contrary to Roach's assertions, the Supreme Court of Virginia also "reviewed the records in other capital murder cases in which robbery was the underlying offense and a sentence of life imprisonment was imposed." Id. In addition, the Supreme Court of Virginia considered the mitigating factors in Roach's case, including his young age and unstable family background. Id. at 114. Having reviewed all of these factors, the Supreme Court of Virginia concluded that Roach's sentence was "neither excessive nor disproportionate to the penalty imposed in comparable cases." Id.

The record thus demonstrates that the Supreme Court of Virginia conducted a thorough review of Roach's sentence in compliance with Virginia law. Although this court may view this matter differently, it may not review the state court's good-faith finding that the death sentence was not disproportionate or excessive when compared to the sentence imposed in similar cases. See Walton v. Arizona, 497 U.S. 639, 655-56 (1990). Accordingly, the court must deny relief on this claim.

IX.

Roach next asserts that he was denied the effective assistance of counsel in violation of the Sixth Amendment when his attorneys failed to argue on direct appeal that the trial court violated his due process rights by failing to instruct the jury properly on the requirement of unanimity in sentencing and by failing to "life-qualify" the jury. The respondent argues that these claims are procedurally defaulted because Roach did not raise these specific claims in his state habeas petition. The court agrees.

In his state habeas petition, Roach argued that he was denied the effective assistance of counsel when his attorneys failed to object to these issues at trial. He also alleged in claim II(EE) that, he was denied the effective assistance of counsel on direct appeal, but he failed to allege specific facts in support of his claim. In his petition for rehearing of his state habeas petition, Roach argued that his attorneys were ineffective for failing to raise on appeal each of the claims that the Supreme Court of Virginia found barred from habeas review under Slayton.

Before a habeas petitioner may obtain relief on a claim in federal court, he first must exhaust his state remedies. 28 U.S.C. § 2254(b)(1). A claim is not exhausted until the petitioner has "fairly presented" his claim to the state's highest court. Picard v. Connor, 404 U.S. 270, 275-78 (1971). The petitioner must have presented the substance of the claim, including the facts underlying the claim, to the state court. Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir.), cert. denied, 118 S.Ct. 102 (1997).

The court finds that Roach has not fairly presented his claims of ineffective assistance of appellate counsel to the Supreme Court of Virginia. In his petition, Roach did not refer to the specific claims that he believed his attorneys should have raised on appeal. Although Roach argued, albeit in conclusory fashion, in his petition for rehearing that his attorneys were ineffective for failing to raise the claims deemed barred from

habeas review under Slayton by the Supreme Court of Virginia, he still failed to set forth with any precision the legal or factual basis for his claims. The court, accordingly, concludes that Roach has failed to exhaust his state remedies as to his claims of ineffective assistance of appellate counsel.

If the petitioner has not exhausted his available state remedies, a federal court ordinarily should dismiss without prejudice the petitioner's claim for habeas corpus relief to permit the petitioner to exhaust his state remedies. Preiser v. Rodriguez, 411 U.S. 475 (1973). A federal court, however, need not dismiss the claim without prejudice if it is clear that state law would bar review of the claim in state court. If a nonexhausted claim is barred from review in state court, the claim is also barred from federal review. Gray v. Netherland, 518 U.S. 152, 161-62 (1996); Bassette v. Thompson, 915 F.2d 932, 936 (4th Cir. 1990).

If Roach were now to raise his ineffective assistance claims in state court in a second petition for writ of habeas corpus, it is clear that the Supreme Court of Virginia would find the claims procedurally barred. In Virginia, a petitioner may not raise a claim in a successive habeas corpus petition if the facts giving rise to the claim were known by or available to the petitioner at the time he filed his original petition. Va. Code § 8.01-654(B)(2). Roach's ineffective assistance of counsel claims are not based on facts that were unavailable at the time he filed his first petition for writ of habeas corpus. Therefore, to the extent that Roach failed to raise these claims in state court, the claims are barred from federal review. See Gray, 518 U.S. at 161-62.

Even assuming that Roach's presentation of these claims in state habeas was sufficient to exhaust his state remedies, the court finds that the Supreme Court of Virginia's adjudication of these claims was reasonable under 28 U.S.C. § 2254(d). To demonstrate that he has been denied his Sixth Amendment right to the effective assistance of counsel,

petitioner must satisfy the two-prong test announced in Strickland v. Washington, 466 U.S. 668 (1984). First, he must show that his counsel's representation fell below an objective standard of reasonableness. Id. at 688. In determining whether a petitioner has made this showing, the court begins with the strong presumption that counsel's conduct was within the wide range of objectively reasonable assistance. Evans v. Thompson, 881 F.2d 117, 123-24 (4th Cir. 1989). Second, petitioner must show that his attorney's conduct prejudiced him to the extent that it deprived him of a fair trial. Strickland, 466 U.S. at 689. He must establish that, but for his attorney's alleged deficient performance, there is a reasonable probability that the result of the proceedings would have been different. Id. A reasonable probability is one that undermines confidence in the outcome of the proceeding. Id.

Roach first alleges that his attorneys rendered ineffective assistance on direct appeal when they failed to argue that the trial court improperly instructed the jury on the requirement of unanimity at the penalty phase of the trial. The trial court instructed the jury as follows:

> You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life, or to imprisonment for life and a fine of a specific amount, but not more than one hundred thousand dollars ($100,000). Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt the following aggravating circumstance, that after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society. If you find from the evidence that the Commonwealth has proved that

> circumstance beyond a reasonable doubt, then you may fix the punishment of the defendant at death, but if you believe from all of the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at, one, imprisonment for life, or two, imprisonment for life and a fine of a specific amount, but not more than one hundred thousand dollars ($100,000). If the Commonwealth has failed to prove that circumstances beyond a reasonable doubt, then you shall fix the punishment of the defendant at, one, imprisonment for life, or two, imprisonment for life and a fine for a specific amount but not more than one hundred thousand dollars ($100,000). Any decision you make regarding punishment must be unanimous.
>
> If you find that the Commonwealth has proved beyond a reasonable doubt the existence of an aggravating circumstance, in determining the appropriate punishment you should consider any evidence presented of circumstances which do not justify or excuse the offense, but which in fairness or mercy may extenuate or reduce the degree of moral culpability and punishment.

(Tr. March 3, 1995 at 1082-1083). Roach argues that the trial court failed to instruct the jury that Virginia law provides for a sentence of life imprisonment if the jury at the penalty phase of a capital murder trial is unable to reach a unanimous verdict, see Va. Code § 19.2-264.4(E), and effectively instructed the jury that a finding of mitigation must be unanimous. He maintains that trial court's unanimity instruction, in combination with its failure to instruct the jury of the consequences of its failure to reach a unanimous verdict, violated his Eighth and Fourteenth Amendment rights under

the holdings of McKoy v. North Carolina, 494 U.S. 493 (1990), and Mills v. Maryland, 486 U.S. 367 (1988), by precluding the jury from considering mitigating evidence. He argues his attorneys were ineffective for not raising this claim on direct appeal.

In Mills and McKoy, the Supreme Court found instructions unconstitutional that informed a jury that a finding as to the existence of a mitigating circumstance must be unanimous. Both Mills and McKoy involved capital sentencing schemes whereby the jury was required to make a finding as to the existence of specific mitigating circumstances. McKoy, 494 U.S. at 436; Mills, 486 U.S. at 370. The Supreme Court held that, under such circumstances, it was unconstitutional to instruct the jury that its finding as to the existence of each mitigating circumstance must be unanimous. McKoy, 494 U.S. at 444; Mills, 486 U.S. at 384. A jury instruction violates the holding in McKoy if there is a "reasonable probability" that the jury applied the instruction in such 16 a way as to preclude its consideration of mitigating evidence. Williams v. French, ___ F.3d ___, 1998 WL 246105, at * 10 (4th Cir. May 18, 1998) (citing Boyde v. California, 494 U.S. 370, 380 (1990).

In contrast to the capital sentencing schemes at issue in Mills and McKoy, the capital sentencing scheme in Virginia does not require jurors to make findings as to the existence of particular mitigating circumstances. In Roach's case, the trial court instructed the jury to "consider any evidence presented of circumstances which. ... in fairness or mercy may extenuate or reduce the degree of moral culpability and punishment." Unlike the juries Mills and McKoy, the jury in Roach's case was instructed to consider all mitigating evidence and was not required to make specific findings regarding enumerated mitigating circumstances. Because the jurors in Roach's case were not required to make an explicit decision regarding specific mitigating factors, it is unlikely that the general unanimity instruction given in Roach's case prevented the jury from considering and giving effect to the mitigating evidence.

Moreover, the verdict form used in Roach's case stated that the jury's decision had to be unanimous only with regard to a finding of future dangerousness and a decision to impose a death sentence. The verdict form indicated that the jury had to consider all of the mitigating evidence presented and did not limit the jury's consideration of mitigating evidence in anyway.[6]

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[6] The verdict form provided to the jury read as follows:

We, the jury, on the issue joined, having found the Defendant, guilty of the willful, deliberate, and premeditated killing of a person in the commission of robbery while armed with a deadly weapon, and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

_____

Foreperson

or

We, the jury, on the issue joined, having found the Defendant, guilty of the willful, deliberate, and premeditated killing of a person in the commission of robbery while armed with a deadly weapon, and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

_____

Foreperson

or

We, the jury, on the issue joined, having found the Defendant, guilty of the willful, deliberate, and premeditated killing of a person in the commission of robbery while armed with w deadly weapon, and having considered all of the evidence in

The Court finds that the instruction, when considered in conjunction with the verdict form, did not create a "reasonable probability" that the jury applied the instruction in such a way as to preclude its consideration of mitigating evidence. See Williams, 1998 WL 246105, at *10. Accordingly, to the extent that the Supreme Court of Virginia addressed this claim on the merits, its adjudication of the claim was reasonable under Strickland.

Roach also alleges that his attorneys rendered ineffective assistance when they did not argue on appeal that the trial court failed to "life-qualify" the jury in violation of Roach's rights under the Sixth, Eighth, and Fourteenth Amendments. The trial court asked the prospective jurors the following three questions:

> (1) Do you have any belief or opinion which would prevent or substantially impair you from voting to find a defendant guilty of capital murder because a possible sentence is death?
>
> (2) Do you have any belief or opinion which would prevent you from voting or even considering voting for the death penalty if the jury has found the defendant guilty of capital murder?
>
> (3) Do you have any belief or opinion which would prevent or substantially impair you from voting for a sentence of less than death if the

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aggravation and mitigation of such offense, fix his punishment at imprisonment for life and a fine of $_____
(fine must not be more than $100,000.00).

_____
Foreperson

jury has found the defendant guilty of capital murder?

(Tr. Feb. 28, 1995 at 46-48).

Roach argues that the trial court violated his right under the Sixth and Fourteenth Amendments to an impartial jury when it asked only a single life-qualifying question, In Mackall v. Angelone, 131 F.3d 442, 451 (4th Cir. 1997) (en banc), the Fourth Circuit found questions substantially similar to those posed in Roach's case adequate under the Sixth and Fourteenth Amendments. For the same reasons, this court concludes that the trial court's voir dire in this case did not violate Roach's Sixth and Fourteenth Amendment rights. The court finds unpersuasive Roach's assertion that the numerical disparity between the life-qualifying question and the death-qualifying questions prejudiced Roach and denied him an impartial jury. Certainly, the Supreme Court of Virginia reasonably could conclude that the attorneys' failure to argue on appeal that the numerical disparity violated Roach's constitutional rights did not amount to ineffective assistance of counsel under Strickland.

Roach also argues that he had a right, under the Eighth Amendment, to question prospective jurors regarding their views on mitigating evidence to ensure that the jurors' personal views would not prevent them from considering mitigating evidence. He asserts that his attorneys' failure to raise this issue on appeal constituted ineffective assistance of counsel. Roach, however, has not cited any case which holds that a defendant's Eighth Amendment right to have the jury consider mitigating evidence includes a right to engage in voir dire of jurors regarding their views on mitigating evidence. Because Roach has not shown that the trial court's voir dire violated his constitutional rights, he has not shown either deficient performance by his attorneys or prejudice. Therefore, to the extent that this claim was properly raised in state habeas, the court concludes that the Supreme Court of Virginia's

adjudication of the claim did not conflict with clearly established law as decided by the United States Supreme Court.

X.

This young man committed a disturbing crime, and a jury of his peers has recommended, the state trial judge has imposed, and the Supreme Court of Virginia has affirmed a disturbing sentence. Competent, dedicated counsel have represented him in this proceeding, and the court has thoroughly examined the record for cognizable, prejudicial, constitutional error. Finding none, the court is constrained to dismiss his petition.

An appropriate order will be entered this day.

ENTER: This 29th day of July, 1998.

CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 1, 1999

No. 98-26
CA-97-693-R

STEVEN EDWARD ROACH
Petitioner - Appellant

v.

RONALD ANGELONE, Director, Virginia Department of Corrections
Respondent - Appellee

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor

CLERK

VIRGINIA:
IN THE CIRCUIT COURT OF GREENE COUNTY

COMMONWEALTH OF VIRGINIA,

v.

FILE NO.
94-31

STEVE EDWARD ROACH,
Defendant.

ORDER

Pursuant to Section 53.1-232.1(iii) of the Code of Virginia, having determine that the United States Court of Appeals for the Fourth Circuit has denied habeas corpus relief to the defendant, this Court hereby ORDERS that the death sentence of Steve Edward Roach be carried out on the 25th day of August, 1999, at such a time of day as the Director of the Department of Corrections shall fix.

It is further ORDERED that at least ten (10) days before August 25, 1999, the Director shall cause a copy of this Order to be delivered to the defendant and, if the defendant is unable to read it, cause it to be explained to him. The Director shall make return thereof to the Clerk of this Court.

The Clerk is directed to promptly furnish certified copies of this Order to the following persons:

Ronald J. Angelone, Director
Virginia Department of Corrections
P.O. Box 26963
6900 Atmore Drive
Richmond, Virginia 23261

The Honorable Daniel R. Bouton
Commonwealth's Attorney
Greene County
P. 0. Box 368
Stanardsville, Virginia 22973

Steven Schneebaum, Esquire
PATTON BOGGS L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037

Robert Q. Harris
Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Pursuant to Rule 1:13, Rules of the Supreme Court of Virginia, the Court dispenses with the endorsements of counsel.

Entered this 29th day of June 1999.

_____

Judge

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday 6th *day of A*ugust, 1999.

Steve Edward Roach,
Appellant,

against

Record No. 991817
Circuit Court No.
Criminal) 94-31

Commonwealth of Virginia,
Appellee.

From the Circuit Court of Greene County

Upon consideration of the petition of Steve Edward Roach, an appeal is awarded him from a judgment rendered by the Circuit Court of Greene County on the 30th day of July, 1999; no security being required.

It is further ordered that appellant's opening brief be filed no later than August 20, 1999; that appellee's brief be filed no later than September 3, 1999; and appellant's reply brief, if any, shall be filed no later than September 10, 1999.

This case is consolidated with the case of Steve Edward Roach v. Commonwealth of Virginia, Record No. 991816.

A Copy,
Teste:
David B. Beach, Clerk
By:
Deputy Clerk

CERTIFICATE OF APPEAL

Pursuant to Rule 5:23, 1, David B. Beach, Clerk of the Supreme Court of Virginia, do hereby certify that on August 6, 1999 an appeal was awarded as described in the order to which this certificate is appended. A copy of this certificate and a copy of the order to which it is appended were this day mailed to the lower court indicated in the order and to all counsel of record.

Given under my hand this 6th day of August, 1999.

David B. Beach, Clerk
By:
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday 6th *day of A*ugust, 1999.

Steve Edward Roach,
Petitioner,

against Record No. 991816

Director of the Department
of Corrections,
Respondent.

Upon a Petition for a Writ of Habeas Corpus

On August 3, 1999 came the petitioner, by counsel, and filed an emergency motion for a stay of execution.

Thereupon came the respondent, by the Attorney General of Virginia, and filed a response in opposition thereto.

On consideration whereof, the Court grants the motion and the execution is stayed.

A Copy,
Teste:
David B. Beach,
Clerk
By:
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday 6th *day of* August, 1999.

Steve Edward Roach,
Petitioner,

against Record No. 991816

Director of the Department
of Corrections,
Respondent.

Upon a Petition for a Writ of Habeas Corpus

Upon consideration of the pleadings filed herein, it is ordered that this case be docketed and placed on the privileged docket of this Court for the September, 1999 session.

It is further ordered that petitioner's opening brief be filed no later than August 20, 1999; that respondent's brief be filed no later than September 3, 1999; and petitioner's reply brief, if any, shall be filed no later than September 10, 1999.

This case is consolidated with the case of Steve Edward Roach v. Commonwealth of Virginia, Record No. 991817.

A Copy,
Teste:
David B. Beach, Clerk
By: Deputy Clerk

28 USC § 2254

State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retrospective to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce the part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.